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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

DUDLEY LUKE FOUSSELL,

Petitioner,

v.

PARKER DRILLING OFFSHORE, USA, LLC, THE MERIDIAN RESOURCES CORPORATION, and C & F OFFSHORE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

LAWRENCE D. WIEDEMANN*
Louisiana Bar No. 13457
WIEDEMANN & WIEDEMANN
821 Baronne Street
New Orleans, Louisiana 70113
(504) 581-6180

Counsel for Petitioner

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Whether or not this Court should resolve the irreconcilable conflict between the United States Circuit Courts of Appeal regarding the degree of negligence, "featherweight" or "ordinary", necessary for an injured railway worker to prevail in a FELA claim, 45 USC §§51-61 or a seaman in a Jones Act claim, 46 USC §688. The conflict cries out for resolution by this court because the seaman "wards" of this court should not be subjected to judicial roulette, making winners in one circuit and losers in another. The Second, Third, and Ninth Circuits, support the relaxed "featherweight" burden. See *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2nd Cir. 1999) openly criticizing the Fifth Circuit decision in *Gautreaux v. Spurlock Marine, Infra*, at p. 406; *Mullahon v. Union Pac. R.R.*, 64 F.3d 1358, 1364 (9th Cir. 1995); *Pierce v. Southern Pac. Transp., Co.*, 6 F.3d 603, 607 (9th Cir. 1993); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2nd Cir. 1996); *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 267 (3rd Cir. 1991); while the Fifth and Fourth Circuits support the more onerous "reasonable" standard. See *Gautreaux v. Spurlock*, 107 F.3d 331, 335 (5th Cir. 1997); *Wood v. United States*, 187 F.3d 432 (4th Cir. 1999). The resulting conflict is producing unjust and disparate results in the competing Circuits with numerous Jones Act plaintiffs, like applicant herein, being denied compensation while their fellow seamen in surrounding Circuits are granted compensation under identical factual circumstances. The social affect is catastrophic in that uncompensated seamen have no fall-back compensation scheme as do FELA injured railway workers from whom their rights are derived.

PARTIES TO THE PROCEEDING

Petitioner

DUDLEY LUKE FOUSSELL, a person of the full age of majority and a resident of Houma, Louisiana. Petitioner is an individual and has no corporate affiliations.

Respondents

Parker Drilling Offshore U.S.A., L.L.C.;

Mallard By Drilling, U.S.A., Inc.;

C&F Offshore Incorporated;

Meridian Resources Corp.

TABLE OF CONTENTS

Page

Question Presented i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Statutory and Regulatory Provisions 2

Statement of the Case 2

Reasons for Granting the Writ 4

Argument I 4

Conclusion 11

Appendix

Appendix A
Decision rendered on May 9, 2002, from the United States Court of Appeals for the Fifth Circuit affirming the judgment of United States District Court ..... App. 1

Appendix B
Final Judgment from the United States District Court, Western District, Lafayette Division, dated December 20, 2000 ..... App. 4

TABLE OF AUTHORITIES

Page

CASES

Argus v. Scheppegrell, 472 So.2d 573 (La. 1985).....10

Bommarito v. Penrod Drilling Corp., 929 F.2d 186 (5th Cir. 1991) 7

Ferguson v. Moore-McCormick Lines, Inc., 352 U.S. 521, 1 L. Ed. 2d 511, 77 S.Ct. 457 (1957).....7, 9

Gautreaux v. Spurlock Marine, Inc., 107 F.3d 331, (5th Cir. 1997) .....i, 7, 8, 9

Hines v. Consolidated Rail Corp., 926 F.2d 262 (3rd Cir. 1991)..... i

Mullanhon v. Union Pac. R.R., 64 F.3d 1358 (9th Cir. 1995)..... i

Pierce v. Southern Pac. Transp. Co., 6 F.3d 603 (9th Cir. 1993)..... i

Ribitzki v. Canmar Reading & Bates, 222 F.3d 658 (9th Cir. 1997) 7

Rogers v. Missouri Pacific R. Co., 351 U.S. 500, 1 L. Ed. 2d 493, 77 S.Ct. 443 (1957) 7, 8

Texas Food Indus. Assoc. v. United States Dept. of Agricultural, 81 F.3d 578 (5th Cir. 1996)..... 9

Ulfik v. Metro-North Commuter R.R., 77 F.3d 54 (2d Cir. 1996)..... i, 8

Vendetto v. Soniat Offshore Drilling Co., 725 So.2d 474 (La. 1/20/99)..... 9

Williams v. Long Island Railroad Company, 196 F.3d 402 (2d Cir. 1999).....i, 7, 11

Wood v. United States, 187 F.3d 432 (4th Cir. 1999)..... i

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 USC §1254(1) 1

28 USC §2106 1

45 USC §51 ..... i, 2, 7, 10, 11

46 USC §688 ..... i, 2, 7, 11

OTHER SOURCES

Frank L. Maraist & Thomas C. Galligan, *Louisiana Tort Law* §39-2 (1996) 10

OPINIONS BELOW

The within Jones Act/General Maritime complaint was originally filed in the United States District Court for the Southern District of Texas, Galveston Division, under Civil Action No. G-99-399 as a non-jury case under FRCP 9(h). This case, together with a number of other cases, was reassigned because of the terminal illness of the wife of Honorable Samuel B. Kent, United States District Court.

The case was transferred to Honorable Rebecca F. Doherty, United States District Judge, Western District of Louisiana, Lafayette Division.

Judge Doherty tried the case non-jury from August 7 to August 10, 2000, and on December 20, 2000, rendered a final Judgment in which she found plaintiff/applicant, Dudley Foussell, to be guilty of 75% comparative fault. *App.* pp. 4-10.

Plaintiff/applicant filed a timely notice of appeal to the United States Court of Appeals for the Fifth Circuit. The Court on May 9, 2002, rendered judgment affirming the judgment of Judge Doherty. *App.* pp. 1-3.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on May 9, 2002. This petition for writ for certiorari is filed within the prescribed period of 90 days after May 9, 2002.

This jurisdiction of this Honorable Court is invoked under the provisions of 28 USC §§1254(1) and 2106.

STATUTORY AND REGULATORY PROVISIONS

This case involves 45 USC §51 (FELA) and 46 USC §688 (the Jones Act).

STATEMENT OF THE CASE

Dudley Luke Foussell, a semi-illiterate 42-year-old father of four children with a seventh (7th) grade rural Louisiana education, is the plaintiff/applicant herein.

On August 16, 1997, he was the 37-year old captain of the M/V MARGARET, a thirty-five (35) foot offshore crew boat owned and operated by Mallard Bay Drilling, L.L.C., defendant/respondent, under exclusive charter to Parker Drilling U.S.A., Inc.

The M/V MARGARET operated between Matagorda Bay, Texas, and Parker Rig 23 in the Gulf of Mexico.

C&F Offshore, Incorporated, was under contract with Parker to dispatch vessels to, and from, Rig 23 to Matagorda Bay and receive, and load, material on said vessels at Matagorda Bay.

On August 15, 1997, Foussell was dispatched with the M/V MARGARET by David Serrette, Parker's toolpusher and his superior, from Rig 23 to the Matagorda Bay dock to pick up a 20-foot long 6 inch PVC pipe urgently needed on the rig. David Serrette knew that the M/V MARGARET was not equipped with exterior pipe racks, or cleats, and that the pipe, because of its length would have to be stored partially in the cabin and partially on the rear deck of the M/V MARGARET.

Parker had under charter a tugboat large enough to transport the PVC pipe safely on its deck. However, David Serrette chose to use the M/V MARGARET because it could make the trip in half the time.

David Serrette had never seen the M/V MARGARET haul pipe as long as that which it was assigned to haul on August 16, 1997.

Foussell departed the rig at approximately 11:00 o'clock a.m. and arrived at the dock at Matagorda Bay one and one-half hours later. After tying up the M/V MARGARET, Foussell spoke with Gary Reeves, the C&F dispatcher, about the pipe which had not yet arrived to be loaded onto the vessel.

At approximately 4:00 o'clock that afternoon, the pipe was delivered to the dock. The pipe was too heavy for Foussell to lift by himself, so he and the delivery driver loaded it onto the M/V MARGARET. They loaded the pipe lengthwise onto the M/V MARGARET placing one end in the cabin and one on the rear deck.

Foussell was told by Reeves to wait at the dock because there was other equipment to be delivered and loaded on the M/V MARGARET for transportation to Rig 23 with the pipe already aboard the vessel.

Sometime during the night, or the early morning hours, David Serrette, the toolpusher, decided that he no longer needed the pipe that had been loaded on the M/V MARGARET. He called Gary Reeves on the radio and advised him to unload the 20-foot length of PVC pipe from the M/V MARGARET. Neither Gary Reeves, nor David Serrette, conveyed this information to Dudley Foussell, the captain of the M/V MARGARET, although they had

radio capability of communicating with the M/V MARGARET.

At approximately 6:00 a.m. on August 16, 1997, Gary Reeves, with a helper, went aboard the M/V MARGARET, without the knowledge of Foussell and began pulling the pipe out of the cabin at which time it struck Foussell in the head. Foussell had been lying on a bunk in the cabin and had sat up to put on his shoes when he heard noise on the rear deck.

The Lower Court found Foussell to be 75% at fault for the occurrence of the accident.

The United States Fifth Circuit Court of Appeals affirmed the judgment of the Lower Court.

REASONS FOR GRANTING THE WRIT

I. THE IRRECONCILABLE CONFLICT BETWEEN THE UNITED STATES CIRCUIT COURTS OF APPEALS REGARDING THE DEGREE OF NEGLIGENCE "FEATHERWEIGHT" OR "ORDINARY" PREREQUISITE TO RECOVERY BY A RAILWAY WORKER UNDER FELA, OR A SEAMAN UNDER THE JONES ACT AND GENERAL MARITIME LAW.

The Circuit Court conflict may, at first blush, seem insignificant and not worthy of this Court's consideration. However, in Circuits, like the Fifth, and Fourth, where the more onerous "ordinary" standard is utilized, disabled seamen "wards" of this Court and disabled railway workers are daily being denied recovery and forced to seek treatment at charity hospitals and meager sustenance

through Social Security disability. On the other hand in the Second, Third, and Ninth Circuits, the disabled railway workers are being granted full recovery under the "slightest", "featherweight", standard. The foregoing undesirable effects in the Fourth and Fifth Circuits put the responsibility for the disabled seaman on the shoulders of the American taxpayers instead of on the shoulders of the employer beneficiaries of their labors.

The Lower Court, and the Appellate Court herein, did not directly address the conflict posed herein but in finding the plaintiff/petitioner 75% contributorily at fault could only have done so by invoking the more stringent burden.

Plaintiff/petitioner was the captain of the M/V MARGARET, a 35-foot crew boat owned by his employer, Mallard Bay Drilling, L.L.C., defendant/respondent herein. The vessel was under exclusive contract with Parker Drilling Offshore, U.S.A., L.L.C., defendant/respondent, to service and supply Parker's Rig 23 in the Gulf of Mexico. C&F Offshore Incorporated, defendant/respondent, was under contract with Parker to furnish dispatching, and loading vessels for Parker in Matagorda, Texas

Parker's toolpusher, and plaintiff/petitioner's superior, David Serrette, dispatched the M/V MARGARET from Parker Rig 23 in the Gulf of Mexico to Matagorda Bay, Texas, to pick up a 25 foot length of PVC pipe urgently needed on the rig. David Serrette knew that the M/V MARGARET did not have an external rack for transporting pipe. He also knew that there was a tug available to transport the pipe safely but chose the M/V MARGARET because of the difference in speed and the critical need of

the pipe on Rig 23. He knew that the pipe would have to be placed in the cabin and on the rear deck because of the length of the pipe, the size of the vessel, and the absence of external pipe racks.

The pipe was delivered to the dock at approximately 4:00 o'clock on the afternoon of August 15, 1997, and was loaded onto the M/V MARGARET by plaintiff with the assistance of the delivery man. One end of the pipe was placed in the cabin and the other end on the rear deck.

Gary Reeves, the C&F dispatcher for Parker, instructed plaintiff/petitioner to remain at the dock because there was other equipment that needed to be loaded and delivered to Rig 23.

Sometime during the night, or early morning hours, David Serrette, Parker's toolpusher, decided that he did not need the PVC pipe and told Gary Reeves, the C&F dispatcher, to take the pipe off of the M/V MARGARET. Plaintiff/petitioner, who was lying down in the cabin, was not aware of the conversation between Serrette and Reeves. At approximately 6:00 o'clock a.m., Gary Reeves went onto the M/V MARGARET and, without warning, undertook to unload the pipe in accordance with the instruction of Serrette. He pulled the pipe from the rear deck, thereby dislodging it from its resting point in the cabin and striking plaintiff in the head.

Obviously, a seaman employee, like plaintiff/petitioner herein, could not contribute 75% of the cause of the within accident under the "slightest" standard and the abolition of assumption of the risk under the FELA and Jones Acts.

The Lower Court's conclusion, affirmed by the Appellate Court, could only have been reached in this seaman's

action by invocation of the "ordinary" standard instead of the "featherweight" standard.

The conflict originated with the Legislative language in 45 USC §51, (FELA), incorporated into 46 USC §688 (the Jones Act), which provides in pertinent part, that:

> "every common carrier by railroad . . . shall be liable in damages . . . for such injury or death ***resulting in whole or in part*** from the negligence of any of the officers, agents, and employees of such carrier." (Bold emphasis added).

This Court in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 1 L. Ed. 2d 493, 77 S.Ct. 443, (1957) used the term "slightest" to describe the reduced standard under FELA and in *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S., 521, 523, 1 L. Ed. 2d 511, 77 S.Ct. 457 (1957), extended the "slightest" standard to the Jones Act.

The United States Fifth Circuit Court of Appeals, prior to the decision in *Gautreaux v. Spurlock Marine, Inc.*, supra has defined the "slightest" standard as "featherweight" in *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186 (5th Cir. 1991), and the United States Ninth Circuit of Appeals in *Ribitzki v. Canmar Reading & Bates*, 111 F.3d 658 (9th Cir. 1997).

The foregoing led to the regrettable head-on conflict between the Circuits best symbolized by the decisions in *Williams v. Long Island Railroad Company*, 196 F.3d 402 (2nd Cir. 1999), and *Gautreaux v. Spurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997).

The Court in *Williams v. Long Island Railroad Company*, supra, at page 406, stated its position, as follows:

> "The Supreme Court has said, based on the explicit language of the statute, that with respect to causation, a relaxed standard applies in FELA cases so that an employer is liable for injuries caused 'in whole or in part' by the employer's negligence. *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506–07, 1 L. Ed. 2d 473, 77 S.Ct. 443 (1957) (quoting 45 USC §51, which states in relevant part: 'Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury . . . or . . . death . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier . . . . '). **While some circuits have limited the application of the 'in whole or in part' language to the element of causation and applied traditional standards to the duty of care, see e.g., *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (*en banc*), this circuit has explicitly stated that it construes 'the statute, in light of its broad remedial nature, as creating a relaxed standard for negligence as well as causation,'** *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 & N.1(2d Cir. 1996) (noting that the Supreme Court has not expressly held that a relaxed standard for negligence, as opposed to causation applies under FELA) (citing *Syverson*, 19 F.3d at 825); see also *Eaton*, 398 F.2d at 741. ('There can be no doubt that under [FELA] the right of the jury to pass upon the question of fault and causality must be liberally viewed.')" (Bold emphasis supplied).

The United States Fifth Circuit Court of Appeals, on the other hand, citing this Court's decisions in *Rogers v. Missouri Pacific R.R*, 352 U.S. 500, 506, 1 L. Ed. 2d 493,

77 S.Ct. 443, (1957) and *Ferguson v. Moore-McCormick Lines, Inc.*, 352 U.S., 521, 523, 1 L. Ed. 2d 511, 77 S.Ct. 457 (1957), concluded, at page 336, as follows:

> "Nothing in these cases, then, supports the proposition that the duty of care owed is slight. **Rather, the phrase 'whole or in part' as set forth in the statute, or as it has come to be known 'slightest' modifies only the causation prong of the inquiry. The phrase does not also modify the word 'negligence'.** The duty of care owed, therefore, under normal rules of statutory construction, retains the usual and familiar definition of ordinary prudence. See *Texas Food Indus. Assoc. v. United States Dept. of Agricultural*, 81 F.3d 578, 582 (5th Cir. 1996) (stating it is a 'cardinal cannon of statutory construction ... [in interpreting a statute,] the words of a statute will be given their plain meaning.')." (Bold emphasis supplied).

To further illustrate and hone in on the problem, the Louisiana Supreme Court, accepting the decision of the United States Fifth Circuit Court of Appeals in *Gautreaux v. Scurlock Marine, Inc,*, supra, as binding on it under maritime law, and attempting to reconcile the employer's traditional obligation to provide a safe place to work to its seaman employees, in *Vendetto v. Soniat Offshore Drilling Co.*, 725 So.2d 474 (La. 1/20/99), made the following pertinent observation at page 479:

> "Nevertheless, since the duty to provide a safe place to work allocates substantial risk of maritime employment to the employer, identical conduct is not demanded of the employer and the employee. *Force*, 25 J. Mar L & C 3:19. The law allocates different risks to different parties, and that allocation forms part of the reasonableness

> equation in the negligence determination. A defendant's standard of care, like that of the plaintiff, varies according to the conduct in which the party is engaged. Frank L. Maraist & Thomas C. Galligan, Louisiana Tort Law §39-2 (1996). See also *Argus v. Scheppegrell*, 472 So.2d 573 (La. 1985). (When a doctor prescribed large amounts of drugs to a young patient known by the doctor to be a drug addict, the doctor was in a greatly superior position to avoid the risk of the patient's death from a drug overdose, and was not allowed to defeat recovery under the then rule of contributory negligence, by pleading the exact conduct by the patient that was the risk prompting imposition of the duty on the doctor not to prescribe large amounts of drugs). The determination of who has the duty to eliminate or minimize the risk of an injury-causing hazard is central to the negligence inquiry. The duty on the employer to make the workplace safe may, in a sense, impose a greater duty on the employer than the duty on the seaman to use reasonable care for his own safety."

It is suggested that this Court cannot reconcile a century of railway labor law and maritime law requiring an employer to provide a safe place to work, safe tools, safe equipment, adequate rules, adequate regulations, and an adequate crew, with a "reasonable" standard putting the employer, and employee, on the same level. The "slightest", or "featherweight", standard is the only one that comports with the intent of Congress, cognizant of the law at the time of passage of 45 USC §51. Obviously, the Congress knew that railway workers and seamen were "naked" if not able to recover under statutory law since Congress had not passed a "parachute" compensation statute. Certainly, this was not an oversight on the part of

Congress but a specific intent to give superior rights to this segment of the American labor force, recognized by this Court as "wards".

The United States Fifth Circuit Court of Appeals has vacillated from "featherweight" to "reasonable" and the evolution has, and will, reek havoc on the wards of this Court.

It is respectfully submitted that the law of the Second, Third, and Ninth Circuits should be adopted by this Court and the law of the Fifth and Fourth Circuits rejected.

CONCLUSION

It is respectfully submitted that this Honorable Court should grant a writ of certiorari and, after due proceedings, that the Judgments of the United States Circuit Court of Appeal for the Fifth Circuit and the United States District Court, Western District of Louisiana, Western Division, be reversed and this matter remanded for a new trial consistent with the burden of proof application to claims under 45 USC §51 and 46 USC §688 as defined by the Appellate decisions in the Second, Third, and Ninth Circuits best defined in *Williams v. Long Island Railroad Company, et al*, supra.

Respectfully submitted,

WIEDEMANN & WIEDEMANN
LAWRENCE D. WIEDEMANN,
Bar #13457
821 Baronne Street
New Orleans, Louisiana 70113
Telephone: (504) 581-6180

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-40100

DUDLEY FOUSSELL

Plaintiff-Appellant

v.

MALLARD BAY DRILLING, INC, LLC; ET AL

Defendants

MALLARD BAY DRILLING, LLC;
PARKER DRILLING OFFSHORE USA, LLC;

Defendants-Appellees

v.

C&F OFFSHORE SERVICES, INCORPORATED

Defendant-Appellee-Appellant

Appeals from the United States District Court
for the Southern District of Texas, Galveston
USDC No. G-99-CV-399

(Filed May 9, 2002)

Before KING, Chief Judge, and SMITH and PARKER, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Plaintiff Dudley Foussell sued defendant Parker Drilling Offshore USA, L.L.C. (Parker) for negligence under the Jones Act, 46 App. U.S.C. § 688 (Supp. 2001), and unseaworthiness of the vessel on which he was employed, as well as for recovery of unpaid maintenance and cure. Foussell also asserted a general maritime negligence claim against defendant C&F Offshore Services, Incorporated (C&F). Parker cross-claimed against C&F for indemnity with respect to Parker's payment of maintenance and cure to the plaintiff. After a bench trial, the district court determined that the accident that precipitated the suit was caused by the concurrent negligence of Foussell and Gary Reeves, an employee of C&F, and assessed comparative fault at seventy-five percent to Foussell and twenty-five percent to Reeves. The court found that no negligence or vessel unseaworthiness for which Parker was responsible contributed to cause Foussell's injuries. The court awarded damages against C&F, reduced seventy-five percent for Foussell's fault. The court also awarded Foussell certain maintenance and cure owed by Parker and allowed Parker recovery of maintenance and cure against C&F by way of indemnity.

On appeal, Foussell argues that the district court clearly erred in finding him negligent. Alternatively, he argues that the district court clearly erred in assessing his comparative fault at seventy-five percent. On brief and at oral argument, Foussell essentially reargued his view of the facts. But the evidence supports the district court's conclusion that he created a dangerous condition aboard the vessel that he captained by the unstable method that he chose to stow the pipe. Had we been the trier of fact, we might or might not have chosen to allocate seventy-five percent of the fault to Foussell, but there is simply no way

for an appellate court to conclude that the district court clearly erred in so doing.

Foussell also argues that the district court erred in finding the vessel seaworthy. He claims that because the vessel lacked side cleats and because of the relative size of the vessel and the pipe, he could not have taken the pipe aboard other than how he did. There was ample testimony, however, that there were safe (if not ideal) ways to stow the pipe, and the district court could certainly have correctly concluded (as it did) that any temporary unseaworthiness of the vessel resulted from the way that Foussell, the master of the vessel, chose to stow the pipe.

Foussell claims that the district court deprived him of a fair trial and was biased against him. We have reviewed the portions of the record that Foussell points to, and what we see is a very engaged and knowledgeable district judge doing her job well. There is no evidence of bias, and the trial was entirely fair.

Finally, the damage award was handled by the district court with the same care as the other aspects of the trial and we find no error.

The judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

DUDLEY FOUSSELL	)	
VS.	)	**CIVIL ACTION NO.**
	)	**G-99-399**
PARKER DRILLING	)	**Rule 9H Admiralty**
OFFSHORE USA, L.L.C.,	)	
ET AL.	)	

FINAL JUDGMENT

This cause came on to be heard in its regular order, and Plaintiff Dudley Foussell and Defendants C&F Offshore Services, Inc. ("C&F"), Parker Drilling U.S.A. ("Parker"), and The Meridian Resources Corporation ("Meridian") appeared through their respective attorneys of record, and each party announced ready for trial. The case was filed pursuant to rule 9(h) of the Federal Rules of Civil Procedure and this case was therefore tried non-jury. Each side presented evidence to the Court.

The Court in corporates into this Judgment its Ruling dated November 27, 2000, as if fully set forth herein and adopts its rulings and Findings of Fact and Conclusions of Law contained therein.

The Court, after considering all of the evidence, finds that Defendant C&F, acting by and through its agents and/or employees, was negligent and that such negligence was a proximate cause of the occurrence and injuries in question. The Court further finds that Plaintiff Dudley Foussell was negligent on the occasion in question and that such negligence was a proximate cause of the occurrence in question. The court further finds that Parker and

Meridian were not negligent, and that the M/V Margaret was not unseaworthy. The Court apportions the comparative fault of each party and finds that 75% of the negligence is attributable to Plaintiff Dudley Foussell and that 25% of the negligence is attributable to Defendant C&F. The Court awards damages to Plaintiff Dudley Foussell and to Parker pursuant to its indemnity claim as follows:

1. Back and Neck Injury

The Court awards to Parker and against C & F the amounts Parker has paid in past cure for Plaintiff's neck and back injuries: $1,098.00 paid to Dr. Delmare Walker, $759.00 paid to Terrebonne General Medical Center; $191.00 paid to Houma radiology Associates; $895.00 paid to Terrebonne Physical Therapy; $6,513.56 paid to Dr. Kenneth Adatto; $924.00 paid to Dr. Gerald F. Burns; $935.00 paid to Dr. Jacobs; and $205.88 Parker has paid for prescription expenses. A total amount of $11,521.44 is awarded to Parker and against C & F for past cure paid to Plaintiff for his neck and back injury.

The Court awards to Plaintiff and against C & F the amounts Parker has not paid in past Cure by virtue of its claim adjustment policies or other reasons: $2,454.64 for treatment by Dr. Adatto; $141.00 for treatment by Dr. Gerald Burns; $975.00 for treatment by Dr. Sherman Brown; and $1,432.38 for prescription expenses. A total amount of $5,003.02 is awarded to Plaintiff and against C & F for past cure for Plaintiff's neck and back injury.

The Court denies Plaintiff's claim against Parker for cure and against C&F for damages as to the $42,283.93 representing the cost of the anterior fusion and its related

costs. The Court denies Plaintiff's claim for future medical expenses and future cure for his back and neck.

2. Loss of Time Incidents/Seizures

The Court awards Plaintiff no past or future damages from C&F or past or future cure from Parker resulting from Plaintiff's alleged loss of time incidents/seizures. The Court denies Plaintiff's claims against C&F and against Parker for maintenance and cure relating to treatment of Plaintiff's alleged loss of time incidents/seizures.

3. Hallucinations

The Court awards Plaintiff Foussell no damages for past or future maintenance and cure and denies Plaintiff's claim against C&F for past or future damages relating to Plaintiff's alleged hallucinations. The Court denies Plaintiff's claims against C&F and against Parker for maintenance and cure relating to treatment of Plaintiff's alleged hallucinations.

4. Headaches

The Court awards Plaintiff $1,452.75 in past cure for his neurological treatment.

The Court denies any future cure for Plaintiff's headaches. The Court awards to Plaintiff as against C&F future medical damages, reduced by Plaintiff's 75% comparative fault, for the full cost of one year's additional treatment by Dr. Elliott and the cost of one year's additional medication; a net sum to Plaintiff in the amount of $561.00. The Court denies Plaintiff's claim for medical damages as to future treatment by Dr. Schwartz.

5. Bladder/Erectile Dysfunction

The Court awards Plaintiff $16,231.06 as past medical cure for his past erectile and bladder dysfunction. Of this amount, Parker has already paid to Plaintiff or on behalf of Plaintiff $4,558.28. A total amount of $11,672.78 is therefore awarded to Plaintiff and against C&F for past cure for his erectile and bladder dysfunction not paid by Parker, and $4,558.28 is awarded to Parker and against C&F for past cure paid to Plaintiff for his erectile and bladder dysfunction.

The Court denies Plaintiff's claim for future cure for bladder/erectile dysfunction. The Court further denies Plaintiff's claim for future medical damages against C&F for future treatment or expenses of Plaintiff's bladder/erectile dysfunction.

6. Depression

The Court awards Plaintiff $5,360.53 as cure for past psychological/psychiatric treatment. Plaintiff's claim for future cure for his depression is denied. The Court awards to Plaintiff as against C&F future medical damages, reduced by Plaintiff's 75% comparative fault, for the full cost of one year's additional treatment by Dr. McSherry and the cost of one year's Paxil medication; a net sum to Plaintiff in the amount of $257.50.

7. Economic Damages

The Court awards Plaintiff $119,022 for past and future loss of wages; $40,285.00 for past loss and $78,737.00 for future loss. Said amounts are reduced by Plaintiff's comparative fault of 75% and thus represents a

net award to Plaintiff and against C&F in the amount of $29,755.50.

8. Pain and Suffering/Mental Anguish

The Court awards Plaintiff $125,000 for pain and suffering against C&F. This award is reduced by Plaintiff's 75% comparative fault and results in a net award to Plaintiff of $31,250.00.

9. Maintenance Payments

The Court awards to Parker and against C&F $21,580.00, representing the maintenance payments Parker has made to Plaintiff.

It is therefore **ORDERED** by the Court that Plaintiff recover from Defendant C&F, the amount of $23,489.08 in past cure.

It is further **ORDERED** by the Court that Parker recover from Defendant C&F, the amount of $16,079.72, representing the past cure paid by Parker to or on behalf of Plaintiff.

It is further **ORDERED** that Plaintiff recover from Defendant C&F the total sum of $61,824.00 as economic, future medical and general damages. Plaintiff is also awarded pre-judgment interest at the rate of 5.58% from 16th day of August, 1997 through the present on all damages awarded against C&F, with the exception of the future economic damage award ($19,684.25) and the future medical expenses ($818.50). Plaintiff Foussell is also awarded post-judgment interest on the award against

C&F from the date of this judgment at the prevailing rate until paid.

It is further **ORDERED** that Parker is awarded post-judgment interest on the award of maintenance and cure against C&F from the date of this judgment at the prevailing rate until paid.

The parties are allowed such writs and process as may be necessary in the enforcement and collection of this judgment.

All relief not expressly granted herein is denied.

Done in Lafayette, Louisiana this 20 day of December 2000.

/s/ [Illegible]
UNITED STATES
DISTRICT JUDGE

APPROVED AS TO FORM:

By: /s/ Kurt Siess
Kurt Siess
SBN: 18345485
1100 Louisiana, Suite 3050
Houston, Texas 77002
Telephone: (713) 757-1400
Telecopier: (713) 759-1217
ATTORNEY IN CHARGE
FOR PLAINTIFF

By: /s/ David C. Redford
David C. Redford
SBN: 16666000
Davis Oretsky & Guilfoyle, P.C.
1415 Louisiana, Suite 4200
Houston, Texas 77002
Telephone: (713) 659-1010
Telecopier: (713) 659-1122
ATTORNEY IN CHARGE FOR DEFENDANTS PARKER DRILLING U.S.A., THE MERIDIAN RESOURCES CORPORATION AND THE MERIDIAN RESOURCE & EXPLORATION COMPANY:

By: /s/ James M. Kimbell
James M. Kimbell
State Bar No. 11420000
Bijan R. Siahatgar
State Bar No. 18336200
Griggs & Harrison, P.C.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 651-0600 – Telephone
(713) 651-1944 – Facsimile
ATTORNEYS-IN-CHARGE FOR DEFENDANT C&F OFFSHORE SERVICES, INCORPORATED

(2)

Supreme Court, U.S.
FILED
OCT 1 2002
CLERK

No. 02-168

In The

Supreme Court of the United States

DUDLEY LUKE FOUSSELL,

Petitioner,

v.

PARKER DRILLING OFFSHORE, USA, LLC, THE MERIDIAN RESOURCES CORPORATION, and C & F OFFSHORE, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI OF RESPONDENT C & F OFFSHORE SERVICES, INCORPORATED

H. LEE LEWIS
Counsel of Record
BIJAN R. SIAHATGAR
JAMES M. KIMBELL
STRASBURGER & PRICE, L.L.P.
1301 McKinney, Suite 3200
Houston, Texas 77010-3033
(713) 951-5600/(713) 951-5660 – FAX
Counsel for C & F Offshore Services, Incorporated

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a conflict between the United States Circuit Courts of Appeals raised by the facts of the underlying case?

RULE 29.6 STATEMENT

Parties to the Proceeding and Statement Pursuant to Rule 29.6.

Pursuant to R. 29.6, Respondent declares there is no parent or publicly held company owning 10% or more of the corporation stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
REASONS TO DENY THE WRIT	5
I. The Court's Finding of Fault Does Not Implicate the Jones Act	5
II. The Court's Findings Do Not Implicate a Conflict Between the Circuits	5
III. No Conflict Between the Circuits	6
IV. Issue Not Previously Raised	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES

Gautreaux v. Spurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) (en banc) 6

Karvelis v. Constellation Lines, S.A., 806 F.2d 49 (2d Cir. 1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987) 6

Ulfik v. Metro-North Commuter R.R., 77 F.3d 54 (2d Cir. 1996) 6

William v. Long Island R.R. Co., 196 F.3d 402 (2d Cir. 1999) 6

STATUTES

28 U.S.C. § 1254(1) 1

46 U.S.C. § 688 (Supp. 2001) 1

BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent, C & F Offshore Services, Incorporated ("C & F"), presents this Brief in Opposition to the Petition for Writ of Certiorari by Dudley Luke Foussell ("Foussell"), C & F requests that this Court deny Foussell's Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This is a maritime personal injury action brought by Plaintiff Dudley Foussell ("the plaintiff") against Defendants Parker Drilling Offshore USA, L.L.C. ("Parker") and C & F Offshore Services, Incorporated ("C & F"). The plaintiff pleaded causes of action against Parker for negligence under the Jones Act, 46 U.S.C. § 688 (Supp. 2001), and unseaworthiness of the vessel on which he was employed, as well as a claim for recovery of unpaid maintenance and cure. He asserted a general maritime negligence claim against C & F. Parker cross-claimed against C & F for indemnity with respect to its payments of maintenance and cure benefits to the plaintiff.

The case was tried to the court below without a jury. At the conclusion of trial, the district court dictated "preliminary" findings of fact and conclusions of law into the transcript [R. 8:212-282], which were later adopted

and supplemented in a written order [R. 4:696; App. R. E. Tab 2]. The court determined that the accident made the basis of this suit was caused by concurrent negligence of the plaintiff and an employee of C & F, Gary Reeves, and assessed the comparative fault at seventy-five percent to the plaintiff and twenty-five percent to Reeves. The court found that no negligence or vessel unseaworthiness for which Parker was responsible contributed to cause the plaintiff's injuries, but it further found that Parker was liable for certain unpaid maintenance and cure benefits.

Pursuant to its findings and conclusion, the court rendered a final judgment [R. 4:702; App. R. E. Tab 2] awarding plaintiff recovery of damages against C & F, reduced by seventy-five percent for his contributory fault. The judgment also awarded the plaintiff recovery of maintenance and cure benefits against Parker, and allowed Parker recovery of this sum over against C & F by way of indemnity.

The plaintiff appealed the district court's judgment in his favor in several particulars. The question presented by Foussell in his Petition for Writ of Certiorari was not addressed or raised in either of the lower courts herein.

Most of the facts as found by the district court pertaining to the occurrence of the subject accident are not in dispute and may be summarized as follows.

The plaintiff was employed by Parker as master of the M/V Margaret, a small supply vessel used for the ferrying of equipment and personnel from shore to Parker's offshore drilling rig. [R. 8:213] The Margaret was about thirty-five feet in length and carried no crew other than a master. At the time material to this case, the Parker rig,

known as Rig 23, was engaged in drilling a well in Matagorda Bay off the coast of Texas under contract to Meridian Resources Corporation ("Meridian"). Meridian hired C & F to provide dispatching services, *i.e.*, to arrange for and coordinate the delivery of supplies and cargo for loading onto the Margaret at a dock facility located at Port O'Connor, Texas. The C & F employee assigned to this particular job was Gary Reeves, who maintained an office in a trailer at the dock facility where he had telephone contact with the rig and radio contact with the Margaret. [R. 4:213]

The accident made the basis of this suit occurred on August 16, 1997. On the previous day the tool pusher on Rig 23, David Serrette, a Parker employee, requested the Meridian company man to arrange for delivery from shore of a joint of PVC pipe which he intended to use in the completion of certain shutdown operations on the rig. This request was relayed by the company man to Reeves, and Serrette requested the plaintiff to take the Margaret into the Meridian dock facility to take delivery of the pipe and bring it back to the rig. Sometime later that day, the Margaret reached the dock and tied up with its stern, and the PVC was delivered to the dock by truck. Reeves then assisted the plaintiff in handling the pipe, which was twenty feet in length with a diameter of about six inches and weighed an estimated one hundred pounds. The two of them removed the pipe from the truck and loaded it onto the Margaret. The plaintiff chose to store the pipe onboard by laying one end through a doorway leading from the main deck down into the boat's underdeck cabin, with the other end extending onto the rear top deck. The floor of the cabin was three steps down, or about thirty inches below the top deck. Because, as he said, he was concerned about

the pipe scratching the floor of the cabin, the plaintiff placed the end of the pipe extending into the cabin on top of a container, specifically a water cooler which was about eighteen inches tall and had a domed lid. The plaintiff placed the cooler on the topmost of two ten-inch high steps leading to the forward opening into the cabin, so that the length of the pipe within the cabin was suspended about thirty-eight to forty inches above the floor. The pipe was not in any way secured in this position but simply laid in place. [R. 8:214-222, 228, 232-236, 239-241]

Apparently additional deliveries were anticipated for the Margaret, so the plaintiff was advised by Reeves that he should keep the Margaret at dock until the following morning. Accordingly, the plaintiff spent the night in the cabin on the Margaret. By the next morning, the tool pusher on Rig 23 had evidently decided that he would not require the PVC pipe after all and had communicated this to Reeves. Contrary to the factual recitation in Plaintiff's Petition, Reeves went on to the Margaret and awakened the plaintiff, who came up on to the deck of the boat to talk to Reeves and learn that the pipe was not to be transported to the rig but was to be removed from the boat. It was understood that the two of them would handle the pipe in getting it off the boat in the manner that they had brought it aboard together the previous day. Reeves remained on the deck to grab the pipe from that end while the plaintiff went into the cabin to handle the other end. At this point, the plaintiff decided that he should be wearing his shoes when doing this work, and so he sat down on an adjacent bench and leaned in with his head and shoulders underneath the suspended length of pipe to put on his shoes. As he did this, Reeves pulled on his end of the pipe from the deck, with the result that the pipe

rolled off the top of the cooler and struck the plaintiff on the back of his neck, causing the injuries of which he complains in this action. [R. 8:226-235]

REASONS TO DENY THE WRIT

I. The Court's Finding of Fault Does Not Implicate the Jones Act

Foussell argues the Court's finding that Foussell/Petitioner was seventy-five percent contributorily at fault must be the result of the Trial Court's application of the "reasonable" negligence standard applicable to Jones Act cases in the United States Fifth Circuit Court of Appeals. The district court's finding that Foussell/Petitioner was seventy-five percent contributorily at fault and that C & F was twenty-five percent negligent does not, however, implicate the Jones Act. It is undisputed that C & F was never plaintiff's employer. The Jones Act has no application when determining liability in a non-employer/employee relationship. Even assuming Foussell/Petitioner is arguing that the Trial Court's zero percent negligence finding against Parker Offshore U.S.A. LLC is evidence of the court's invocation of the "more onerous ordinary standard" applicable in the Fifth Circuit, Foussell/Petitioner would be speculating, because there is no evidence and no finding that the Trial Court relied on this standard, or even considered it, when finding plaintiff's employer, Parker Drilling, zero percent negligent. The Trial Court's allocation of negligence therefore does not implicate the Jones Act or the negligence standard made the basis of Foussell/Petitioner's Petition for Writ of Certiorari.

II. The Court's Findings Do Not Implicate a Conflict between the Circuits

Foussell's desire to raise an issue of conflict between the Circuit Courts of Appeals is premised on speculation, and is wholly unsubstantiated. The alleged irreconcilable conflict between the United States Circuit Courts of Appeals regarding the degree of negligence prerequisite to a recovery by a seaman under the Jones Act is not raised by the facts or law of this case. Even assuming the degree of negligence necessary for a Jones Act liability finding is implicated by the Court's fact finding, there is no evidence or indication in any of the Trial Court's pronouncements or orders that its fault finding was premised on either a "featherweight" or "ordinary" degree of negligence. A conflict of the circuits, if any, is not implicated in this case.

III. No Conflict Between the Circuits

Neither case cited by Foussell/Petitioner as the basis for his Writ was reviewed by this Court. *Gautreaux v. Spurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997) (*en banc*); *William v. Long Island R.R. Co.*, 196 F.3d 402 (2d Cir. 1999). The Second Circuit's opinion conflicts with other opinions rendered by other panels of the same court. *See, Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52-53 & n.2 (2d Cir. 1986), *cert. denied*, 481 U.S. 1015, 107 S.Ct. 1891, 95 L.Ed.2d 498 (1987); *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 n.1 (2d Cir. 1996). The Second Circuit has not reviewed the Jones Act negligence standard in an *en banc* decision. There is therefore no clear conflict between the circuits.

IV. Issue Not Previously Raised

The purported conflict between the circuits, or the standard of negligence applicable to Foussell/Petitioner's claims against C & F and Parker, were never raised, by pleading or otherwise, in the trial court or on appeal to the Fifth Circuit. A de novo review or discussion of this issue in this Court is therefore improper.

The facts and proceedings underlying this case neither give rise to a conflict between the circuits, nor make a review by this Court of an alleged conflict between the circuits appropriate at this time.

CONCLUSION

Foussell's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

STRASBURGER & PRICE

H. LEE LEWIS, JR.
State Bar No. 12312000
BIJAN R. SIAHATGAR
State Bar No. 18336200
JAMES M. KIMBELL
State Bar No. 11420000
Attorneys for Respondent
C & F Offshore Services, Incorporated

Supreme Court, U.S.
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No. 02-0168

In The
Supreme Court of the United States

DUDLEY FOUSSELL,

Petitioner,

vs.

MALLARD BAY DRILLING, L.L.C., TEXAS MERIDIAN RESOURCES CORPORATION, PARKER DRILLING OFFSHORE USA, L.L.C., THE MERIDIAN RESOURCE CORPORATION, THE MERIDIAN RESOURCE & EXPLORATION COMPANY, C&F OFFSHORE SERVICES, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT PARKER DRILLING OFFSHORE USA L.L.C.'S BRIEF IN OPPOSITION TO DUDLEY FOUSSELL'S PETITION FOR WRIT OF CERTIORARI

DAVID C. REDFORD
State Bar No. 16666000
1415 Louisiana, Suite 4200
Houston, Texas 77002
(713) 659-1010 - Telephone
(713) 659-1122 - Facsimile

Attorney of Record For Respondent Parker Drilling Offshore USA, L.L.C.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CORPORATE DISCLOSURE

Parties to the Proceeding and Statement Pursuant to Rule 29.6

Pursuant to Rule 29, the Corporate Disclosure requirement was provided in the Petition for Writ of Certiorari.

TABLE OF CONTENTS

Page

Corporate Disclosure i

Table of Authorities iii

Clarification of the Record 1

Reasons for Denying the Writ 3

I. The Suggested Conflict Between the Circuits Is Questionable And If It Exists the Conflict Is Not Mature For Review. 3

II. The Case is Fact-Bound and is Unworthy of Supreme Court Review. 6

III. The Degree of Negligence Issue Was Not Raised in the Lower Courts Or Discussed By the Courts. 8

Conclusion 9

Appendix

Partial Findings of Fact and Conclusions of Law Adopted in the Court's Ruling of November 27, 2000. ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269 (3d Cir. 1995) 3

Gautreaux v. Spurlock Marine Ins., 107 F.3d 331 (5th Cir. 1997) 3, 4, 5

Joyce v. Atlantic Richfield Co., 651 F.2d 676 (10th Cir. 1981) 4

Karvelis v. Constellation Lines, S.A., 806 F.2d 49 (2nd Cir. 1986), *cert. den.*, 481 U.S. 1015, 95 L.Ed.2d 498, 107 S.Ct. 1891 (1987) 3, 5

Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957) 3

Smith v. Tow Boat Serv. & Management, Inc., 66 F.3d 336 (9th Cir. 1995) (unpublished) 3

Syverson v. Consolidated Rail Corp., 19 F.3d 824 (2d Cir. 1994) 4

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 87 L.Ed. 610, 63 S.Ct. 444 (1943) 3

Ulfik v. Metro-North Commuter R.R., 77 F.3d 54 (2d Cir. 1996) 4, 5

Urie v. Thompson, 337 U.S. 163, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949) 4

Williams v. Long Island Railroad Co., 196 F.3d 402 (2d Cir. 1999) 3, 4, 5

Ybarra v. Burlington N., Inc., 689 F.2d 147 (8th Cir. 1982) 3

TABLE OF AUTHORITIES – Continued

Page

STATUTES

46 U.S.C. § 688 3

RESPONDENT PARKER DRILLING CORPORATION'S BRIEF IN OPPOSITION TO DUDLEY FOUSSELL'S PETITION FOR WRIT OF CERTIORARI

I. CLARIFICATION OF THE RECORD

The Statement of the Case in the Petition leaves out all facts related to the extreme negligence of Dudley Foussell. It also ignores the evidence from David Serrette and the expert for Parker Drilling, Richard Frenzel, that there were many safe ways to stow the pipe on the vessel that were not used by Captain Foussell. It is a specific misstatement by Petitioner that David Serrette knew the pipe had "to be stowed partially in the cabin and partially on the rear deck of the M/V MARAGRET." Parker Drilling will simply repeat the Statement of Facts it presented to the Fifth Circuit as an accurate summary of the facts.

Foussell was captain of the M/V MARGARET on August 16, 1997. Dudley Foussell had several years of experience on crew boats and had carried pipe to crew boats many times. On many occasions, he would carry the pipe in the cabin of boats and would not secure the pipe. He could have tied it to a rail on the side of the boat but he did not think of it. When there are no cleats on the side of a crew boat, it is very common to put pipe in the cabin.

On the morning of August 16, 1997, Foussell was awakened by the dispatcher, Gary Reeves, who told him that they were going to take the pipe off the boat. Foussell went back in the cabin of the boat to put on his shoes which were under the pipe. The pipe fell on Foussell's head or neck when he put his head under the pipe. Foussell saw Reeves holding the pipe. However, Reeves denies pulling

the pipe but he thought the pipe was pulled by someone when Foussell was hit.

It was Foussell's decision as to where to stow the twenty-foot piece of PVC pipe. He decided to put the pipe in the cabin. The day before he had put an iron pipe in the cabin and it had scratched the floor. On this occasion, he decided to put the end of the pipe on the water cooler so it would not scratch the floor. He did not want to secure the pipe to anything in the cabin because he might need to move it quickly. It is the captain's duty to secure cargo.

The expert for Parker Drilling Company, Richard Frenzel, testified that there were at least four safe methods to carry the PVC pipe on the vessel which were either secured on the side of the vessel or over the cabin or in the cabin. In any of these methods, the pipe should be secured to the vessel and this can be done safely. The toolpusher, David Serrette, was of the opinion that Dudley Foussell had enough experience to know that pipe should be secured on the vessel and it was the captain's duty to secure pipe and other cargo. Mr. Serrette considered that it was safe to carry a twenty-foot piece of pipe on this crew boat. He had seen pipe secured on crew boats over twenty-five times. The water cooler on the M/V MARGARET was eighteen inches tall and had an oval or rounded top. Mr. Serrette described methods to safely secure the pipe on the side of the vessel or on the top of the cabin.

REASONS FOR DENYING THE WRIT

I. The Suggested Conflict Between the Circuits Is Questionable And, If It Exists, the Conflict Is Not Mature For Review.

Petitioner's request for review is based primarily on a supposed conflict in the circuits. Specifically, Petitioner highlights the conflict between the Fifth Circuit in *Gautreaux v. Spurlock Marine Ins.*, 107 F.3d 331, 335 (5th Cir. 1997) and the Second Circuit in *Williams v. Long Island Railroad Co.*, 196 F.3d 402, 406 (2d Cir. 1999). Petitioner states that the *Gautreaux* court requires an ordinary care standard for negligence under the Jones Act, 46 U.S.C., Sec. 688, while the Second Circuit has only a featherweight standard. The Fifth Circuit in an en banc decision in *Gautreaux* found that its previous cases had been mistaken in finding a featherweight burden of proof for negligence in Jones Act cases. The *Gautreaux* court engaged in a detailed analysis of how the Fifth Circuit had mistakenly moved from a standard of slight causation in *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 506, 1 L.Ed.2d 493, 77 S.Ct. 443 (1957) to a standard of slight negligence. The court corrected this mistake and found that a reasonable care standard was supported in the other circuits and the Supreme Court. The Fifth Circuit cited the following cases in support of its holding: *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995); *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67, 87 L.Ed. 610, 63 S.Ct. 444 (1943); *Smith v. Tow Boat Serv. & Management, Inc.*, 66 F.3d 336 (9th Cir. 1995) (unpublished); *Karvelis v. Constellation Lines, S.A.*, 806 F.2d 49, 52-53 (2nd Cir. 1986), *cert. den.*, 481 U.S. 1015, 95 L.Ed.2d 498, 107 S.Ct. 1891 (1987); *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 150 (8th Cir.

1982); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 681 (10th Cir. 1981); *Urie v. Thompson*, 337 U.S. 163, 174, 93 L.Ed. 1282, 69 S.Ct. 1018 (1949).

The Fifth Circuit in *Gautreaux* analyzed its prior cases and found that it had mistakenly established a rule that employees were liable to seaman when they were only slightly negligent. The court said:

> The above survey of our decisions shows the confused start and the diverted path leading to the "settled law" in this Circuit that a Jones Act employer is bound by a greater-than-ordinary standard of care towards its employees and that a seaman owes only a slight duty to look after his own safety. We agree with the Third Circuit that nothing in the text or structure of the FELA-Jones Act legislation suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances. *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3d Cir. 1995). p. 738

The only case since the *Gautreaux* case that has commented on the Fifth Circuit position is *Williams v. Long Island Railroad Co.*, 196 F.3d 402, 406 (2d Cir. 1999). The Second Circuit in *Williams* acknowledged the *Gautreaux* conclusion but determined that it would follow *Ulfik v. Metro-North Commuter R.R.*, 77 F.3d 54, 58 (2d Cir. 1996) to maintain a "relaxed standard for negligence." The *Ulfik* court stated in a footnote that the Supreme Court has not held that a relaxed standard for negligence applies under FELA. It went on to state that a prior Second Circuit case had found a relaxed standard of negligence, citing *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824, 825 (2d Cir. 1994). However, the *Syverson* court

only quoted the statute establishing a reduced standard of causation, not a reduced standard for negligence. The court said:

> Thin as this evidence is, it is enough under FELA to raise a jury question as to whether the railroad exercised *reasonable care* given what was reasonably foreseeable, to furnish Syverson with a safe workplace. p. 827. (emphasis added)

The court did not say that the standard was slight care or slight negligence. The *Ulfik* court did not comment on the *Karvelis* case cited by the *Gartreaux* court as supporting the reasonable care standard in the Second Circuit. Thus, the analysis by the *Williams* court was superficial and made no effort to compare the burden of slight causation to the burden of slight negligence in prior Second Circuit cases.

It is clear that the Second Circuit has not carried out a cathartic analysis of this issue as was done by the en banc Fifth Circuit in *Gautreaux*. There are still inconsistencies in the Second Circuit cases and there is not an established rule that slight care as opposed to reasonable care for the employer is enough. Respondent submits that there is not a clear rule within the Second Circuit so that it can be said that the Second Circuit is in conflict with the Fifth Circuit, which has established a clear rule in the en banc decision in *Gautreaux*.

In neither the *Gautreaux* nor *Williams* cases was there a petition for certiorari filed. There have been no cases discussing a possible conflict between the circuits since the *Williams* case. Plainly, from this lack of discussion on this issue in the circuits this issue regarding the standard for negligence is not a significant issue at this

time. This question should be allowed to percolate for a period of time to allow the Second Circuit and other circuit courts to consider the reasoning carried out by the en banc Fifth Circuit court before the Supreme Court considers taking this issue.

II. The Case is Fact-Bound and is Unworthy of Supreme Court Review.

In the court's Final Judgment, its Ruling dated November 27, 2000, was incorporated (Petitioner's App. 4). The court's Ruling dealt primarily with Foussell's complicated medical condition. In the Ruling, the court adopted its preliminary rulings and partial Findings of Fact and Conclusions of Law announced at the end of the trial. These extensive findings on liability are quoted in Respondent's appendix. The purpose of including these findings as an appendix is to show the lengthy and well considered analysis by the trial judge of the facts surrounding the accident. The Petitioner accused the trial judge of bias in the appeal to the Fifth Circuit; however, the Fifth Circuit opinion rejected this bias argument and stated " . . . what we see is a very engaged and knowledgeable district judge doing her job well." In forty-eight pages of the partial Findings of Fact and Conclusions of Law (Petitioner's App. 3) the trial court made an analysis of liability. The court explained in this lengthy analysis why the plaintiff was 75% at fault, the defendant, C&F Offshore was 25% at fault and why Parker Drilling was not at fault. A reading of the court's conclusions and analysis shows the following:

1. Captain Foussell accepted the pipe on the boat and if he thought it was not safe, he would not have accepted it, since he left jobs

in his past because of unsafe practices. (Respondent's App. 21)

2. The primary cause of the accident was Captain Foussell's negligence in choosing to put the end of the pipe on a water cooler with a rounded top. (Respondent's App. 24-25, 36-37)

3. There were several safe methods that Captain Foussell could have used to secure the pipe. If he had not placed the pipe on an unstable and rounded surface, an accident would not have occurred. Since Foussell was captain of the vessel he was in charge of safety on his vessel. (Respondent's App. 21)

4. The toolpusher, David Serrette, was not negligent in ordering that the pipe be transported on the vessel, since pipe had been transported on the vessel before and there were safe methods to do so. (Respondent's App. 23-24)

5. Gary Reeves of C&F Offshore was 25% negligent in not giving the captain a "heads up" before he moved the pipe. (Respondent's App. 20, 24-25)

Dudley Foussell did not make a compelling case for negligence against Parker Drilling before the trial court. Petitioner did not even present an expert to state that this vessel was too small to carry this particular pipe. The expert for Parker Drilling, Richard Frenzel, stated that there were at least four safe methods by which the pipe could be secured and carried on the vessel. Given the fact that there were other safe methods to load the pipe, there were two intervening factors that caused Foussell's injuries. First, there was Foussell's negligence in placing a

pipe on a rounded top of a water cooler which was unsecured. Second, there was the negligence of Gary Reeves in moving the pipe while Foussell was bent underneath the pipe.

Even assuming that any conflict in the circuits on the issue in question should be reviewed, this case is far from a good candidate for this review. The primary issue before the trial court was the competing negligence between the Petitioner, Dudley Foussell, and Gary Reeves of C&F Offshore. The type of case that should be reviewed would be one where employer was the only defendant and the issue of slight or reasonable care was distinct and well presented.

III. The Degree of Negligence Issue Was Not Raised in the Lower Courts or Discussed By the Courts.

At the trial court level and before the Fifth Circuit, petitioner never argued or suggested that under the featherweight standard of negligence that Parker Drilling would be found at fault. There was no suggestion that this position was being taken. Thus, the trial court did not pass on the factual or legal aspects of this allegation. There is little doubt based on the extensive findings of the trial court that the court would have concluded that Parker Drilling was not negligent either under a featherweight burden or a customary burden of reasonable care. However, petitioner did not raise this issue and this is another reason why this case is inappropriate for granting certiorari.

CONCLUSION

The trial court thoroughly analyzed the facts and found that Parker Drilling was not negligent. The court was correct. Further, it is very questionable that there is a conflict in the circuits on the issue of slight versus reasonable care. Certainly, if there is any conflict, it is not such a mature or significant conflict to warrant review.

Respectfully submitted,

DAVID C. REDFORD
State Bar No. 16666000
1415 Louisiana, Suite 4200
Houston, Texas 77002
(713) 659-1010 - Telephone
(713) 659-1122 - Facsimile

Attorney For Respondent
Parker Drilling Offshore
USA, L.L.C.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

DUDLEY FOUSSELL, Plaintiff,	*	Docket No. CV99-399
VERSUS	*	August 10, 2000
	*	9:00 a.m.
MALLARD BAY DRILLING, LLC, ET AL, Defendant.	*	Lafayette, Louisiana

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EXCERPT FROM VOLUME IV
REPORTER'S OFFICIAL TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE REBECCA F. DOHERTY,
UNITED STATES DISTRICT JUDGE

COURT REPORTER: Patricia L. Gass, RPR
8607 Ted Dr.
Youngsville, Louisiana 70592

* * *

[213] Plaintiff, Dudley Foussell, is a Jones Act seaman who was employed as the captain of the crew boat, the Marine Vessel MARGARET, owned and operated by his employer, Parker Drilling Offshore USA formerly Mallard Bay Drilling. Parker was engaged in drilling operations for Meridian Resources Corporation on Rig 23 located in Matagorda Bay off the coast of Texas at the time this incident occurred.

At the time of the incident, C&F Offshore Services, Incorporated via the dispatcher, Gary Reeves, was providing dispatching services to Meridian for Rig 23. A formal

written contract was executed between Meridian and Parker. However, the relationship between C&F and Meridian was one of longstanding and had been confected [sic] by a handshake between Ron Ivy, Vice President of Drilling Operations for Meridian, and Frenchy Baumgardner, President of C&F.

On August 15th, David Serrette, who was the tool pusher for Parker Drilling, had sent Mr. Dudley Foussell, the captain of the Marine Vessel MARGARET, to the dock in order to receive and transport a piece of PVC pipe which had been ordered and was needed by Serrette to complete certain [214] shutdown rig operations on Rig 23. All witnesses agree and the invoice, which was presented as an exhibit in this matter, establishes that the 20 foot piece of PVC pipe had in fact been ordered on behalf of Mr. Serrette and had in fact been delivered to the dock on August 15th and was received by Mr. Reeves on August 15th. However, it is here that the memories of the various witnesses involved tend to diverge.

Plaintiff has testified that he did not load the pipe immediately but after it arrived at four p.m.; and sometime in that period, he engaged in loading the pipe onto the Marine Vessel MARGARET with the help of the delivery truck driver, with Reeves as an onlooker or engaged or involved to some extent. It becomes somewhat cloudy as to what Mr. Reeves was doing at that time, except that he was part of the endeavor. To what degree he was involved at that time, the witnesses tend to disagree. Not so much that one remembers specifically one way or the other, but rather that memories fade. However, it is clear and this Court specifically makes the finding of fact that Captain Dudley Foussell loaded the pipe with full knowledge of the C&F dispatcher, Reeves. Serrette, David

Serrette, the tool pusher for Parker had sent with specificity the Marine Vessel MARGARET to go get the pipe rather than using the tug, which was also available. It is not clear whether the [215] alleged accident occurred when the pipe was being loaded or unloaded. However, all versions of the accident from the various witnesses who were present and presented to this Court agree that Dudley Foussell and Mr. Reeves were each in his own way engaged in the process in some fashion of handling this pipe or the movement of the pipe. Mr. Reeves later in his deposition indicates that he did not touch, physically touch the pipe; but he admits he was there during the loading, and in his position admits he was there in the off-loading if in fact that did occur. So he was engaged in the process, whether loading or unloading, to some extent; and Mr. Foussell admits and the other witnesses agree he was engaged in both activities if in fact both did occur.

Consequently, whether they were loading or unloading, it would seem, would not necessarily be determinative. Rather, what would be determinative is, first, whether an accident actually occurred, other than perhaps the captain bumping or hitting the pipe on his own; and if so, who was involved in the ongoing process when the accident occurred; and when the accident occurred, what the mechanics of the actual process which was ongoing were. It would seem these would be the more determinative factors. Consequently, this Court makes the following findings of fact:

First, as to whether or not an accident occurred, this [216] Court finds that an accident did occur on August 16th, 1997. This Court makes that finding based upon the plaintiff's testimony that the pipe hit him and hit him in the back of the head at the base and on the portion of his

neck. It further makes this finding based upon Reeves' statement and testimony that Mr. Foussell came out onto the back deck of his boat, saying that the pipe had hit him. This finding is bolstered by Mr. Bullman, the tug captain, who has no stake in this matter as a litigant or party, who also indicated that although it was a, quote, nonevent, close quote, in his opinion, he does remember laughing because the captain said, you know, he got hit; and it seemed to him for some reason comical. This finding is further bolstered by the incident report and the investigative report. Although there is a discrepancy between the two as to the occurrence, whether it was loading or unloading, both indicate that Mr. Foussell said and told Mr. Serrette that he had had an accident and he had hurt his neck and back. Additionally, this is bolstered by Mr. David Serrette's testimony that in fact on the 16th, Mr. Foussell did come to him and say "I had an accident," and that Mr. Serrette hoped that it would not be something that would be reportable because Mr. Foussell said he was all right. And therefore, Mr. Serrette hoped that it would not have to be a lost-time accident; and it's [217] also bolstered by the testimony of Mrs. Foussell. Consequently, this Court finds that an incident, an accident did occur on August 16th, 1997 involving Dudley Foussell.

Now, who was involved in the ongoing process at the time? This Court finds based upon the more credible testimony presented that the plaintiff had been involved in the loading and, if in fact off-loading occurred, in the off-loading. This Court finds based upon Mr. Reeves statement given some two months after the accident that the statement which was entered into evidence – and the statement was taken on November 3rd, 1997, this incident having occurred on August 16th, 1997 – that Mr. Reeves

admitted at that time that he was there and that he was involved. In fact, his statement in pertinent part reads as follows:

The pages are not numbered. I'm assuming it would be Page 2. Question: "So it was you two guys loading this plastic pipe in the crew boat; right?" And reference is being made to a potential Brown Water hand being there with him. Answer: "It was already in the crew boat, and we were going to take it out." Question: "Okay. Who put it in the crew boat? Do you know?" Answer: "Yeah. They loaded it in there like the night before, we had loaded it in there." Question: "Who loaded it in there?" Answer: [218] "Myself and Dudley." Question: "Okay. So the pipe was already in the boat. You all were unloading the pipe?" Answer: "Yes, ma'am." Question: "So yourself and Dudley loaded the pipe the night before, and now it's the next day. And you all are unloading the pipe?" Answer: "Right." Question: "Okay. So you and another gentleman were unloading the pipe. And did you all know that Dudley was in the boat?" Answer: "Did I know he was in there?" Question: "Yes." Answer: "Yes, ma'am. He had walked in the front to help us unload it. He was in the boat to help us unload it." Question: "So he was aware that you all were unloading the pipe?" Answer: "Yes, ma'am." Question: "He was?" Answer: "Yes, ma'am." Question: "Okay. He wasn't?" Answer: "Oh, no. He was aware that we were going to unload it." Question: "But as for the actual process of unloading it, was he aware that you all were doing that?" Answer: "Well, that's what we went over there to do, was to unload the pipe; and he walked into the boat. And he was up inside the boat, and we walked to the back of the boat, or I did. I don't remember if there was somebody there or not, but I think there was. And I walked to

the back of the boat and was going to pull the pipe off; and like I say, about that time, Dudley walked over there; and he leaned down to pick something up off the boat. And the pipe came down and caught him on the back of the neck." [219] And then it continues. And then a little further down. Question: "So he was up when you all were unloading the pipe?" Answer: "Right." Question: "So it was two of you guys grabbing the pipe to unload it?" Answer: "Right." Then it goes on and it picks up again. Question: "Okay. So after this happened, what happened next after that when it fell and then you all picked the pipe back up." Answer: "Yeah. He had to lean down, and we were moving the pipe around. And it kind of got him on the back of the neck; and, you know, I asked him if he was all right. And he said he was fine. And we got the pipe and unloaded the pipe and went on about our business." Then it continues. Question: "Okay. So when you all picked up the pipe, did it just kind of like top heavy, and that's how it fell on him?" Answer: "No. It was laying – like it was laying in the boat all the way to the front of the boat. And there's steps that go up to the front of the boat where the driver sits and stuff and was sitting on there; and when it was pulled out, it dropped down one of those steps right there." Question: "Oh. Okay. So just a small portion of the pipe fell?" Answer: "Yeah. Just the end of it." Question: "The end of the pipe fell on the back of his head?" Answer: "Right."

So this Court finds that at the time of the incident, Mr. Dudley Foussell was in his cabin and was engaged in the [220] overall situation involving the pipe, whether loading or off-loading; that Mr. Reeves was also there and engaged; that Mr. Bullman, based upon Mr. Bullman's testimony, at least saw the pipe at a time when Mr. Foussell came out of the back deck and said, "I got hit" or

"something hit me" or "I got hurt" such that he laughed. Now, there is confusion in Mr. Bullman's mind as to whether it was loading or unloading, but he is very forthright in that to his mind it was a nonevent and it had been some time ago. There is some question as to whether or not this Brown Water hand was there, and there is some question as to whether or not when the actual event involving the injury or alleged injury to Mr. Foussell occurred, whether or not Sean, the other deck hand, was there; but Sean played, in all likelihood it seems, no active role. All right.

Then as to the mechanics of what was occurring at the time. As this Court noted, this Court makes the following findings of fact based upon the evidence and testimony it has received. That on August 15th, David Serrette, a tool pusher with Parker, ordered the vessel of which Dudley Foussell was the captain to go to the dock and to obtain the 20 foot piece of PVC pipe. The pipe was delivered to the dock as is indicated by testimony in the invoice. It was carried to the vessel by the plaintiff and at least one other person. The witnesses are varied on who that was. [221] Mr. Foussell is adamant it was the truck driver.

MR. FOUSSELL: Correct.

THE COURT: It was loaded onto the vessel by Mr. Foussell and at least some other party. However, what is relevant in the specific finding that this Court makes is that Mr. Reeves was involved in that loading. Whether it was hands-on or not depends on whether or not one were to find that this incident occurred loading or unloading. Mr. Reeves says it was unloading. Mr. Foussell says it was unloading; and in fact, this Court finds that that would be the more probable scenario.

This Court finds that the more reasonable scenario based upon the more credible testimony presented by witnesses and the documentary evidence is that Mr. Serrette was trying to shut down his rig, and he was trying to get off site. And before he could do that, he had to get that mud out of the sump; and his vacuum pump was not accomplishing it. This was causing wait time. It is clear from Mr. Serrette's testimony wait time is not a desirable thing in the oil patch. In fact, it is his memory that the wait time was so distressing to both himself and the company man that he believes that in this instance he made an accommodation to the company man and modified his, IADC reports because the wait time was so problematic. Mr. Serrette came up with an idea to fix the problem, and that [222] is to sort of jerry-rig a piece of PVC pipe onto portions of the rig which would allow the sump to be pumped out in a much more efficient fashion. And he ordered by way of the company man a 20 foot piece of 6 inch PVC pipe for that purpose. This Court finds it was ordered. It was delivered, and it was received by Mr. Reeves on August 15th. This Court finds that it was loaded onto the vessel August 15th at some point after the four o'clock delivery and that at least Mr. Dudley Foussell and Mr. Reeves were engaged in that in the sense that they knew it was being put on the boat at that time. This Court also finds that, again, the rig was waiting but not on this pipe per say. The rig was waiting on a Camco SSSV [sic]. That is what had to be there for the rig to complete what it had to do. It's a safety valve. That had to be obtained and had to be put on. They were waiting on that SSV. Now, before Mr. Serrette could sign off, he had to get all the pollution and all the problems, all the cleanup done; and that dealt with the sump. But to finish the job vis-a-vis the company man, they had to have that Camco

man and that SSV; and they had been waiting on that, if you look at the IADC reports. And the company man couldn't finish his job until he got that SSV. Mr. Serrette couldn't finish his until he got the PVC pipe, but the company man couldn't finish what he had to get done vis-a-vis Parker until that safety valve [223] arrived. And they had been waiting on that safety valve for some time if you look at the IADC reports. And that is the wait time that was causing the consternation because in fact what Mr. Serrette thinks he put in the IADC report to cover up the wait time was the pumping out of the sump. So it was waiting on that SSSV [sic] that was causing the greater degree of consternation.

Therefore, it is not unreasonable to accept Mr. Foussell's testimony, and that which is bolstered by some degree by Mr. Reeves, that he was not allowed to go back to the rig with that PVC pipe once he got it after four o'clock on the 15th. If in fact that's what the whole rig was waiting on, they would have sent him back. But for some reason, the vessel logs are clear. Mr. Foussell testifies as well, as does Mr. Reeves, because it was the next morning when Mr. Reeves says he came down to speak to Mr. Foussell about whatever, he had not been allowed to go back to that rig. That's because he was waiting on that Camco hand with the safety valve. Once the Camco hand with the safety valve arrived the next morning, Mr. Foussell was able to make his run back in. That becomes pivotal because Mr. Serrette is very clear that he used a piece of PVC pipe to pump out that sump. What is at issue here from a mechanics standpoint, the mechanics of the incident, is whether or not it was the PVC that had been ordered shown [224] by invoice and arrived that afternoon. Well, it got in sometime after four; but it was well after

nine, a bit after nine the next morning before the run was allowed to be made because the Camco hand hadn't shown up. It is not unreasonable to assume that Mr. Serrette took some of the other PVC pipe that was already on that rig – he testified it was there, it was just of a different diameter – and went ahead and tried it to see if it would work. He's on wait time anyway. It is not unreasonable that he took a piece that he already had the [sic] on the rig, he jerry-rigged it with his duct tape just like he had specific memory of doing, he tried it out to see if it would work. He was waiting anyway, and he didn't have anything to lose. And that would make sense if one looks at the totality of the circumstances. The wait time that caused the consternation and the ultimate accommodation was the wait time on the SSSV. So it is not unreasonable to assume that in fact once he had tried the PVC pipe that was on the rig that in fact at 6:30, as the IADC reports show, there was no need to bring that 20 foot piece of 6 inch PVC pipe out there because he had already gotten it done. Now, he has specifically memory he did it during the day and not at night. There is a discrepancy within the testimony. However, as to whether or not the pipe actually when out there, the scenario that was just laid out by the Court [225] above is not unreasonable. However, all parties agree that while the pipe was being handled in some fashion – and I say parties. I mean in the terms of those who were engaged. Bullman, Reeves, and Foussell, that while pipe this PVC pipe was being handled in some fashion, it hit Mr. Foussell. So as I said earlier, it is not necessary that in fact it be determined whether they were loading or unloading; and the reason for that follows as well with how the mechanics of this matter more than likely occurred.

Additionally the scenario laid out by the Court would be supported by the vessel logs, which don't show a run out on the 15th but do show a run out on the 16th, would be supported by the IADC reports as well and would be supported by the invoice matter. If the pipe arrived in the afternoon of the 15th and that's what they were waiting on and they were so worried about wait time that they were falsifying their IADC reports, it makes no sense that they wouldn't have sent that boat out with that piece of pipe.

At any rate, therefore, the more likely scenario is that they were engaged in off-loading; but this Court need not make the actual determination as to whether it was off-loading or on-loading. The three people who were there at the time the incident occurred agree that he got hit and that Mr. Foussell and Mr. Reeves, at least in Mr. Reeves' statement in November, agree that he had his hands [226] on the pipe at the time that this occurred.

So it is the morning of the 16th. It's 7:30 a.m. or sometime soon there before. This Court finds the more reasonable scenario is that Mr. Reeves walked down to tell Mr. Foussell that they weren't going to need that pipe. Now, it is important to note that in fact the majority of the communication between the rig and the dispatcher, Mr. Reeves, was done by telephone. There was no telephone on that boat. So at 7:30 in the morning, if Mr. Reeves had left his trailer, and coffee pot, which was of key importance to all parties involved – Mr. Bullman talked about the coffee pot being in the dispatcher's office. Mr. Foussell said he didn't have one on the boat, but it was up in the dispatcher's office. But at any rate, if he left that, it is reasonable to assume it was to do something that he could not otherwise accomplish except by going down there. If he

were only going to just discuss matters with Mr. Foussell, he could have done it via the radio. In other words, if he was just going to say "The Camco guy, whoever you're waiting on still isn't here, not sure," he could have don [sic] that by radio. He would not have had to leave the post. That's what a dispatcher does. He's there to answer the rig and then facilitate and coordinate. So he walks down – Mr. Reeves agrees that he walks down. Mr. Foussell agrees that he walked down. Mr. Bullman agrees, [227] as to what it was that Mr. Bullman saw when Mr. Foussell's alleged injury that Mr. Reeves had walked down. So we have all three of them saying he walked down. He woke up the plaintiff. That's in Mr. Reeves' statement, and that's what Mr. Foussell says. And that the captain walked out on the back deck of his boat. He walked out on the back deck of his boat barefooted. That becomes important. He walked out on the back deck of his boat to see what Mr. Reeves might want. It was 7:30 in the morning. He didn't have his shoes on. Now, Mallard Foussell has told me Parker has the rule, which many companies do, boat companies, you can't be fiddling around or working on that boat barefooted. All right.

This Court makes the finding that on the more credible testimony presented that Mr. Reeves told him they were going to do something with the pipe, off-load, on-load, that they were going to do something with the pipe. More likely it is that they were going to off-load. Whether Mr. Reeves had a Brown Water hand with him or not does not necessarily become pivotal. However, once Mr. Foussell was aware that work was going to be done on his boat and that it involved this pipe – and this is why I think it is reasonable that it was off-loadings and not on-loading, because he was reaching for his shoes. If they are in the

on-loading process, he had walked it down from the truck. [228] And everybody who was there agrees he bent over in some fashion. All right. Additionally, once Mr. Foussell was aware because Mr. Reeves told him that they were going to do something with this pipe, more reasonable basis is that they were going to off-load this pipe, then the captain went down into the boat. Now, if you will recall, that's how the pipe has been put. The pipe when it was loaded onto the boat had been placed down into the cabin and on top of a cooler.

Now, the cooler is approximately knee-high, approximately 18 to 20 inches. There are two steps leading up to the step landing, whatever you wish to call it, where the cooler was that are each ten inches or at least certainly one is ten inches, if you assume that the second one would be of equal amount so that it would be within code. That's 20 inches, plus the 18. That's 38 or approximately 38 to 40 inches that the pipe was sitting above. Now, in Mr. Reeves' mind, the captain went down; and it would not be unreasonable for him to assume that the captain was going to help him off-load it in the same fashion the captain helped him on-load it. That is not unreasonable. People don't usually meddle on captains' boats. They generally let the captain do it, and the captain tends to get bent out of shape when somebody meddles on their boat. Nonetheless, the captain admits he [229] went down into the area and does not dispute that he was going to help them off-load it and in fact ultimately did help them off-load it. Mr. Reeves then from his viewpoint, it is not unreasonable to assume that he thought the captain was going down there to help the captain off load. The captain goes down to help them off load, which is work. He has no shoes on. That's a violation of company rules. Therefore. He leans down to

get his shoes. He sits down. According to Mr. Foussell. On the bench. Which is 24 inches high /he leans over; and whether his. As Mr. Siahatgar said. His behind stayed on the bench or came off the bench a little bit or not doesn't seem to be at issue here because he admits he's down underneath that pipe getting his shoes. And gets his shoes and is coming back, and the pipe strikes him. If you will recall, the portion of the statement that I read from Mr. Reeves was that the pipe hit Mr. Foussell, came one step on that top step. Now, it is not clear from the statement how in the world Mr. Reeves knew this unless he could see down in there. I don't know whether he could see in there or not. One can assume that's not unreasonable because the captain said he could see Reeves with his hands on the pipe. So if he could see Reeves' hands, than I guess it is not unreasonable to assume that Reeves could see the captain. And this is Reeves. "Yeah, he had leaned down; and we were [230] moving the pipe around. And it kind of got him on the back of the neck; and, you know, I asked him if he was all right." And then Reeves said talking about the pipe, he says, "There are steps that go up to the front of the boat where the driver sits and stuff and was sitting on there; and when it was pulled out, it dropped down one of those steps right there." "Okay. So just a small portion of the pipe fell?" "Yeah, just the end of it." Question: "The end of the pipe fell on the back of his head?" Answer: "Right." That purports with Captain Foussell's memory that he did not hear that pipe going, sounding its way down the different steps. I asked him several times about that; and he said, "No, I didn't hear that." Mr. Reeves says it just went off that one step.

Now, Mr. Reeves, in either his deposition or statement, indicates that his estimate of the weight of that pipe

is approximately 100 pounds. Consequently, Mr. Reeves knew that the pipe had some substantial weight to it. If Mr. Reeves' testimony is to be accepted – and this Court has made a finding that certain aspects are – then in fact he had manhandled it. He had carried it at some point. He had handled it either in the loading or the off-loading. So he knew. Otherwise, how would he know it weighed a hundred pounds. I don't remember that being on the invoice. But at any rate, he had at some point handled [231] this pipe. Now, that becomes at issue because there is no evidence that Mr. Reeves knew this pipe was sitting on a cooler. There is no evidence that Mr. Reeves ever went down into the belly of the boat and saw that it was sitting on a cooler, except for perhaps when he saw the captain leaning over. If he saw enough to see the captain leaning over and it fall on him, then it is not unreasonable to assume he would have seen the cooler. But this Court need not make that finding or determination. What is relevant here is that there is no specific testimony at this time that Mr. Reeves knew specifically that it was sitting on the cooler, but he knew he had a 20 foot piece of pipe weighing approximately 100 pounds angled down into the belly of a small crew utility boat with a captain down in there with him.

What is also relevant is that the captain knew he had a 20 foot piece of pipe of sufficient weight that he could not pull it off the truck. He was specific about that. He thought he could. He tried. He couldn't. He had to get the driver to help him. So he knew he had a heavy piece of pipe. He knew he had it sitting on a cooler. He knew the cooler had a rounded top. He knew the cooler did not completely fill the area where it was sitting, that there was room on either side for it to move and he put – he also

knew he had people on the back deck of his vessel [232] because he had just been out there with him. And this Court has made the finding that he knew that at some point they were going to off-load this or handle rather this pipe. More than likely it is off-load, but certainly they were going to handle this pipe. And yet, he chooses to bend down underneath this pipe.

Now, this Court accepts Captain Foussell's testimony as to why he put the pipe on the cooler. He put the pipe on the cooler because he didn't wish to risk scarring the floor. He testified that prior to that time he had carried a piece of pipe in the same fashion, and it had scarred his floor. He didn't want to scar his floor. So he put it on the cooler. That was his decision, his decision alone. No one told him to do it. No one suggested that he do it, and there is no evidence that anyone knew he had done it. This was the captain's choice.

The pipe extended from the cooler on the stair leading up to the bow door up to and out of the doors going onto the back portion of the vessel at an angel. That opening is 24 inches wide, the open [sic] which goes down to the stair well that one must back down to get into the crews quarters. Mr. Foussell has testified he was on the back deck when the pipe was there, and he has testified that he backed down those same steps when he went down to get his shoes and engage in the off-loading process. He also [233] testified that one reason he did not secure the pipe – and this Court makes the finding of fact and accepts Captain Foussell's testimony that he did not in any way secure the pipe – that one of the reasons he didn't secure it is because his hatches were in the back, and he had some leaks, and he wanted to be able to quickly get into either of those hatches. Given the fact that he has testified that he

wanted to get into the hatches, given the fact that they, according to the exhibits that are put into the record, came together in the middle of the back end of the boat and opened up, then it is not unreasonable to assume that that pipe was angled coming out of that openway. Otherwise, it is not reasonable to assume that a man the size of Mr. Foussell could have gotten down those stairs backwards straddling a pipe. It's only 24 inches wide. It's not secured. It is more reasonable that it is pushed to one side or the other so he can quickly get in at least one of his hatch covers if he has a leak and so he can get down his stairs. But at any rate, the pipe is sticking up through the back portion of that vessel, which brings this matter to Mr. Reeves.

It is clear from the statement that Mr. Reeves gave some two months after this incident that he believed that the captain was aware that they were about to off-load this pipe. It is also clear that he admits that he was, quote, [234] moving it about. It is not unreasonable to assume that he was moving it about, getting it placed perhaps more to the center so that when they pulled it out, it would come out clean. It's a 20 foot long piece of pipe. An angle on it could create a problem when you are trying to get the back end out of the boat, out of the door, the openway. If it is angled, you could catch the end of that. So it is no unreasonable to assume he was getting it straightened. That would account for why a man seasoned in the oil patched [sic] didn't say to the captain, "Hey, Captain, we are about to start. You ready down there?" There is no evidence he did that. That's why it would be reasonable to assume that he was merely getting it somewhat more aligned in order to pull it out. But this Court need not make that specific finding. All this Court need find is what

Mr. Reeves admitted, and that is he was moving the pipe about for whatever reason and that he had not told the captain he was going – he was going to begin the moving process when he did that.

Therefore, if in fact this Court is to find as it has that the pipe was sitting on a cooler some 18 inches above the step, that the top portion of the cooler was rounded and domed and that in fact the cooler did not fill the entirety of the passageway or step or whatever you want to call it that it was sitting on and that it was not secured [235] in any fashion and that at some point in time Captain Foussell bent down underneath that pipe and Mr. Reeves, quote, moved it about, close quote, this Court finds that a portion of the pipe did fall from the cooler to the top step, which would be comport with Mr. Foussell's memory of the sound and Mr. Reeves' somewhat ambiguous testimony in his statement that it went to the first step and it hit Mr. Foussell on the back of the head and perhaps the shoulder. So pipe falls off the cooler to the top step and hits the plaintiff. But again, this Court need not find anything other than it fell, it hit him, Mr. Reeves moved the pipe, Mr. Foussell had put himself underneath that pipe.

Mr. Bullman hears Mr. Foussell say that he had hurt himself. Mr. Reeves hears him say that, and Mr. Foussell gives an accident report when he ends up out at the vessel thereafter. Mr. Foussell testified he did not lose consciousness. Upon reiteration, he testified he had to sit down, and he was dazed. And that again argues that if in fact he had to sit down and he was crouched down underneath the pipe and the pipe had to hit him up here that he sat down in the well of the vessel, which means the pipe couldn't have fallen all the way down. But at any rate, he did not lose consciousness. That is the matter that this Court need

find as a specific finding of fact to tie into the medical testimony, and that he did in fact [236] report an incident to Mr. Serrette. And Mr. Serrette has testified that his investigative report was based on, quote, I think he said, notes that he scribbled at the time; and therefore, this Court finds it not unreasonable that it would not have been accurate.

Consequently, this Court finds that plaintiff, Dudley Foussell, testified that he loaded the pipe into the cabin and placed the pipe on the top of a cooler because he didn't wish to scar his floor, the cooler being approximately 18 inches high, 12 inch diameter with a rounded top sitting on the top step of the portion of the boat that led to the bow door. Again, Foussell testified this was his decision; and he put it on a cooler as he did not want to place the pipe on the floor of the cabin as it would scratch the floor because he had carried some pipe in the same fashion earlier and it had scarred his floor. He did not secure it because he did not wish to block access to the hatch area, and he wanted to be able to move the pipe in order to access the hatch area.

The pipe remained on the vessel some approximately 16 hours. It is unclear whether Foussell made a run to the rig with the pipe on August 15th. However, the vessel logs do not show this. Reeves testified a run was made. However, Mr. Reeves' memory was less than clear, perfect, or consistent.

[237] Mr. Foussell testified he remained at the dock waiting for a passenger or some other material until the morning of August 16th. This comports with the vessel logs, the arrival of the Camco hand, the needed SSSV, and the IADC reports. Consequently, at approximately 6:30 to

7:00 a.m., Foussell was awakened by Reeves, who was accompanied by Captain Billy Bullman and perhaps a third. Foussell came to the back deck of the boat and was informed by Reeves that they no longer needed the pipe on the rig and that they were going to take the pipe off or, as I said, this Court need only make the finding that they were going to handle the pipe in some fashion.

This Court makes the specific finding that no warning was given by Reeves to Foussell that the actual unloading was going to commence at that time other than "We are going to unload it." In other words, he did not give him a warning, "Captain, heads up, we are about to start. Are you ready down there?" That was not done.

Additionally, this Court makes the specific finding that although Foussell first testified that he saw spots after the blow, he later testified that he was somewhat dazed and had to sit down. However, this Court makes the specific finding that he was able to assist in the off-loading of the pipe, that he told both Bullman and Reeves that he was all right; and he later, an hour and a [238] half to two hours later, told Serrette that he was all right and that approximately 15 to 20 minutes after the incident, he left the dock in his vessel and made the one and a half hour run to the rig with a passenger.

Mr. Foussell has been very forthright with this Court that he is of the opinion that if his work environment is not something he feels comfortable with, that it's well within his rights to leave. He has done this several times, gave several instances during his testimony. Consequently, it is not unreasonable to assume that if in fact Mr. Foussell felt that he was sufficiently injured that he would not be safe in handling his boat that he would have

left. He did not do so. It is undisputed that David Serrette told Foussell by way of the dispatcher that the Marine Vessel MARGARET be used to carry the 20 foot pipe piece of pipe. It is undisputed that the back cargo deck of the Marine Vessel MARGARET was something less than 20 feet. It was also undisputed that the captain chose to accept the pipe onto his vessel. Again, this becomes relevant because the captain has made it perfectly clear that if he feels something is not safe, proper, or correct, he will leave a job in a heartbeat. He did it in the instance when he was talking about the hurricane. He was conscientious enough to remain and make certain the boat was all right, but then [239] he quit. The instance with the cook and the microwave oven, the instance with someone he felt who had been less than honorable with him, he quit.

So it is undisputed that Foussell chose to accept the pipe, and it is undisputed that it is within the captain's purview to turn down something that he feels that will render his vessel unfit or make it so dangerous as not to be acceptable.

It is also undisputed that it was Foussell, Captain Foussell, and Captain Foussell alone who chose not to place the pipe directly on the cabin floor. This is a 20 foot piece of pipe. You can repaint cabin floors. Additionally, there are other ways to prevent scarring than putting it up on an 18 inch cooler with a 12 inch diameter and a domed top. One can put a pallet under it, a wooden pallet, a towel under it. One can put a great many things under it, or one can put it on the floor rather than create an unsafe condition. And it is undisputed that the captain chose to do that; and that is what perhaps diminishes to some degree the argument as to whether or not the pipe could have been secured on the outside with bits, without bits, to

tires, above, over, beyond. It seems that begs the question. The blasted pipe could have been put exactly where it was on something else; and then if it were manhandled, it would not have fallen off the cooler because [240] it wouldn't have been on the cooler. And there was testimony by Captain Foussell that he has carried materials in his boat in that fashion, i.e., sticking down into the cabin and up onto the deck times before this; and it did not create a problem. And in fact he said, "I had carried a piece of pipe before, just recently stuck down there in that same way; and it scarred up my floor." That was the only incident that arose out of that. So clearly the vessel was capable of carrying cargo in that fashion in a safe manner if you don't put it on a cooler or if you secure it in some fashion. He chose, and it is undisputed this was his decision. He chose not to secure it because he wanted to get in and out of that hatch. But you could have angled it, and you still couldn't have secured it.

Now, there is some question as to whether or not there was a place for it to be secured on the landing where the cooler was. Perhaps there was. Perhaps there was not. But it is not disputed that at some point from the point of the bow door, the door off to the bow, rather going into the bow, and up and out to the back deck that there was at somewhere along that run a place where it could have been secured. If at no other point, to the railing, the side of the steps at the top, the little prong at the top where the steps went down. So as I said, the plaintiff testified that he had previously safely transported pipe in this same [241] manner; and in fact the only resulting problem of that had been that he had scarred his floor.

This Court notes that defendant's expert, Richard Frinzel, testified as to several other ways that he felt

wherein the pipe could be safely secured for transport which he argues could have avoided the accident. However, again, if you didn't put it on the cooler and you put it on the floor, this accident in all likelihood would not have occurred unless someone were to pull it so far as to pull it all the way off. This Court does not find that's what happened in this instance.

Now, plaintiff has asserted a Jones Act claim for negligence against his employer, Parker. This Court finds no negligence on the part of Parker or its employee, David Serrette, the tool pusher, who ordered Foussell to transport the pipe to the rig on the Marine Vessel MARGARET. Serrette did not instruct Captain Foussell as to how to transport the pipe, how to secure it or not secure it on the boat, how to stow it on the boat, and did not send the captain out in weather conditions or in a rush situation that caused this incident to occur. And Captain Foussell has testified that material has been transported in this fashion on the vessel before with no incident other than scarring the floor; and, of course, there is the defendant's expert which testified that there were other [242] ways that the pipe could have been put. Perhaps none ideal but, that is not the standard for negligence in this matter. There were no other Parker personnel involved. So the negligence in this matter would have been failure to provide a safe place to work, and that would have been in David Serrette ordering them to use the Marine Vessel MARGARET. The Marine Vessel MARGARET had been used prior to this time to carry cargo in exactly this fashion with no incident, and there is not a sufficient evidence upon which this Court could find that had it not been placed on a cooler and not been secured that it could have been carried safely; and that if the captain hadn't put

himself under it – it took some bending to get himself under that piece of pipe. At any rate.

As I said, there is no evidence to show that had the pipe not been placed on an unstable surface approximately 18 inches off the top floor with no manner of it having been secured and the captain having placed himself beneath that level that it could not have been safely carried on that vessel in the fashion anticipated. Again, it doesn't have to be ideal. It's a question of whether or not it was negligent to do it; and then of course, when I get to the concept of unseaworthiness. The law does not require ideal or perfect, but it does require that which could be done in a manner which reasonable people would do. It's [243] reasonable. It's been done before. It would be done again. There is no testimony that it created a hazard in and of itself if it hadn't been sitting on a cooler 18 inches above with a dome top and not secured. Consequently, this Court does not find negligence on the part of Parker. It finds, rather, that as to the use of the Marine Vessel MARGARET and the manner in which it was used, negligence would fall, unfortunately, at the feet of the captain in choosing not to place the pipe on the floor, in choosing to place the pipe on an unstable surface, on a nonflat surface 18 inches above the floor, and in choosing not to secure the pipe that was placed in that fashion and then putting his head and shoulders beneath that pipe with the full knowledge of how it was situated and that there were people on his back deck who were there to engage in off-loading. Consequently, this Court finds in favor of the defendant Parker as to plaintiff's Jones Act negligence claim.

Plaintiff has also asserted a general maritime law negligence claim against C&F for the negligence of their employee, Gary Reeves. This Court finds that based upon

the factual scenario stated by Reeves that he was in fact moving about the pipe and that in fact a heads-up had not been given to the captain, that they were actually now starting the anticipated off-loading process and knowing [244] that he had an approximately 100 pound piece of pipe 20 foot long reaching down into the bow of the vessel with the captain down there with it, that it was negligent on his part for not warning the captain that he was going to actually start and give him a heads-up.

And this Court finds that in fact Mr. Reeves did physically manipulate the pipe based upon his statement taken two months after this accident and that after he manipulated the pipe, quote, moved it about, close quote, the captain said something fell on him. Accordingly, this Court finds that there is negligence on the part of Gary Reeves, employee of C&F. However, this Court has also found that there is comparative fault on the part of the captain, Dudley Foussell, in this matter; and in fact this Court finds vis-a-vis the actions of both parties, Captain Foussell's actions to have contributed 75 percent to his injury and accident and Mr. Reeves 25 percent.

Now, there has been a great deal of debate on whose behalf, if anyone, Mr. Reeves was acting. First, the plaintiff seeks to impute Mr. Reeves' negligence to his employer, C&F, which this Court will address in a moment. Second the plaintiff seeks to impute the negligence of Gary Reeves to Meridian on the basis of agency, i.e., that Reeves was an agent of Meridian. Co-defendant, C&F, seeks to impute the negligence of Reeves to Meridian on the basis [245] of that Reeves was a borrowed servant of Meridian. However, well into this trial, C&F withdrew its claim of borrowed servant. So this Court is left at this time as to the agency matter.

As to agency, the matter of agency as to plaintiff's claim against Meridian for the acts of Gary Reeves all parties agree is governed by the General Maritime law. all counsel have agreed that the law of agency is further restatement, second that Agency Section 1 is controlling. An agency relationship is created when one party consents to have another act on its behalf with the principle controlling and directing the acts of the agent, citing American Telephone & Telegraph Company v. Winback and Conserve Program, Inc., 42 Fed Third, 1421, Third Circuit, 1994 and the Restatement Second of Agency Section 1, 1958. Quote, depending upon the right of control capable of being exercised by the principle over the agent, agents are characterized either as servants or independent contractors, whereas generally are employees of the principle and are subject to physical control by the principle. As one court has explained the distinction, quote, an agent is a person who represents another in contractual negotiations or transactions again thereto. A servant is a person who is employed to perform personal services for another in his affairs and who and with [246] respect his physical movements in the performance of the service is subject to the other's control or right to control. Persons who render services but who retain control the manner of doing it are not servants. Citations omitted. But yet, the employer assumes the right to control the time, manner and method of executing the work and as distinguished from the right merely to require certain definitive results in conforming to a contract. A master's servant's agency relationship has been created, close quote. Citations omitted. If however, the agent is not subject to that degree of physical control but is always subject to the general control and direction of the principle, the agent is termed an independent contractor.

This Court finds that based upon the testimony and documents presented, Reeves was a dispatcher; and as such, his responsibility vis-a-vis Meridian was to assure that the materials and men were timely transported from the rig or to the rig or wherever they were needed. Additionally, he was responsible for signing the invoices and counting the materials, i.e., pipe, etcetera, in order to determine that the proper supplies and materials had been provided by the suppliers. Testimony of Ron Ivy of Meridian is that the company man only instructed Reeves as to the necessary materials, did not control his method of providing or transporting the materials in a timely manner to the rig. [247] Testimony of Mr. Baumgardner, owner of C&F, is that Reeves as his dispatcher was a coordinator, that his job was designed to pull together what was needed and necessary to move men, equipment, and supplies from place to place by way of coordination. Accordingly, based on the facts presented to this Court and the testimony received, this Court finds that an agency relationship did not exist between Reeves as a C&F employee and Meridian, thus to make Meridian responsible for Mr. Reeves' negligence.

Borrowed servant has been withdrawn. Therefore, this Court will not address it, except to say based upon the testimony presented throughout this matter before it was withdrawn and the arguments of counsel, it is not likely this Court would have found borrowed servant to have existed.

Now, there has also been the argument and, of course, plaintiff first seeks to impute Reeves' negligence to his employer, C&F. C&F, through some convoluted procedural process, seeks to have this Court declare that Reeves was acting outside the course and scope of his employment;

and as such, his negligence should not be imputed to his employer. In this process, C&F has moved this Court under 15(b) to amend its pleadings to allege course and scope, the defense of course and scope. The Court deferred its ruling on the 15(b) in order to allow all testimony which [248] C&F wished to put in on this issue to come in and did so either by way of a proffer, ultimately, or by way of matter of the record should the Court allow the 15(b) amendment and overruled plaintiff's vehement objection to the interjection of the issue of course and scope at this late date. Plaintiff also objected to the 15(b) amendment. Mr. Kimball argued vehemently that in fact an amendment is perhaps not necessary under 15(b) because the course and scope under Texas laws which he argues would be applicable does not make it an affirmative defense such that it should in fact have to be included within the pleadings. Again, plaintiff objected because he had not had opportunity to address that issue as to whether or not in fact Texas law would be the applicable law, since in fact General Maritime law was applied.

Additionally, the plaintiff argued that pursuant to Rule 26 and Rule 16 that the issue of course and scope should not be allowed to be interjected at this late time, arguing prejudice and in particular the fact that Mr. Reeves was taken by a videotape deposition, he is not present, he, meaning the plaintiff, was not on notice at the time of Mr. Reeves' deposition that this was going to be done. Mr. Ivy's deposition was taken and presented at trial; and again, plaintiff argues he was not on notice that it is well into trial and he has already reached close [249] to the end of his testimony and evidence. And consequently, to allow it at this time, particularly in light of this Court's order that the plaintiffs submit an outline, the

defendants respond to that outline, and that that outline include the defenses that the defendants intend to use and this Court's verbal admonition to all parties that if a defense was not included that in fact it was deemed waived.

As the record will reflect, this Court had concern because this Court accepted this case off of Judge Kent's docket; and counsel are not, as, such are not accustomed to practicing this Court before this judge. So I had concern, particularly since this was such a pivotal matter of just ruling that in fact C&F was precluded from addressing this issue. Consequently, the Court deferred because one of the issues that the Court should look to by way of case law is the futility of the requested amendment. On issue of motion of leave to amend under Rule 15, the court in Davis v. The United States, Fifth Circuit, October 29, 1991, 961 Fed Second, 53 Fifth Circuit, the court – and I believe that might have been a 15(a) or 15(c) rather than 15(b). The underlying rationale would be the same. Notes that Davis in this matter filed a Federal Rule of Civil Procedure 15 Motion seeking leave to amend his pleadings. Federal Rule of Civil Procedure 15(a) states [250] that leave to amend pleadings shall be freely given when justice so requires. This leave to amend, however, is by no means automatic. And certain cites are given. A district court's decision to grant or deny leave to amend will be overturned only for abusive discretion. Certain cites are given. In exercising this discretion, a district court considers a variety of factors such as undue delay. In this instance, we were well into trial. Bad faith. Plaintiff politely argues that there must have been bad faith involved because it was the defense of course and scope was not raised in the outline, response to the outline as required; and his memory was

that it had not been raised in Mr. Baumgardner's deposition as well. As will become clear later, the Court allowed Mr. Baumgardner's deposition in; and there were questions that dealt with this issue, although it didn't call it by those words. Undue prejudice to the opposing party by allowing the amendments, plaintiff certainly argues that they would be prejudiced. They did not have the opportunity to deal with this with Mr. Reeves. He was brought by way of deposition. They did not have the opportunity to deal with this with Mr. Ivy. He was brought by deposition. And as will become clear, there became problems with Mr. Baumgardner as well. And perhaps the one which was most perhaps instrumental in the Court's decision to defer, the [251] futility of the amendment. As to the futility of the amendment, it becomes incumbent for this Court to have some determination as to whether or not the amendment might well have merit, worth, or succeed.

As such, this Court notes that as parties agree that as to the question of course and scope that the matter would be dealt with by the restatement of torts. The restatement defines scope of employment as follows:

And, Patt, put in what I'm going to highlight. It's the same matter, gentlemen, that I read earlier in response to Mr. Siahatgar. Sylvia, show Patt exactly what comes in, be sure she gets the first portion. I won't take the court's time or the party's time to read it at this time. I've marked them in highlight 1, 2, and 3. And Patt, in that portion when I went through this with counsel and I went through the different factors on it with Mr. Reeves, those are the factors that were put in. So we'll pick up that portion when I was discussing with Mr. Siahatgar this concept, and that would be my reasons on the course and scope.

***REPORTER'S NOTE:** By order of the Court, the following material is being appended to this transcript. It was not actually spoken at the particular time.

The Restatement defines scope of employment as follows:

(1) Conduct of a servant is within the scope [252] *of employment if, but only if:*

(a) it is of the kind he is employed to perform;

(b) it occurs substantially within the authorized time and space limits;

(c) it is actuated, at least in part, by a purpose to serve the master;

(d) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master.

Footnotes:

(1) To be within the scope of the employment, conduct must be of the same general nature as that authorized, or incidental to the conduct authorized.

(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters are to be [253] *considered:*

(a) whether or not the act is one commonly done by such servants;

(b) the time, place, and purpose of the act;

(c) the previous relations between the master and the servant;

(d) the extent to which the business of the master is apportioned between different servants;

(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;

(f) whether or not the master has reason to expect that such an act will be done;

(g) the similarity in quality of the act done to the act authorized;

(h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;

(i) the extent of departure from the normal method of accomplishing an authorized result; and

(j) whether or not the act is seriously [254] *criminal.*

The law is settled that where a servant acts about the master's business for which he is employed, the master is liable although the servant acts beyond his authority or in a forbidden manner. If the servant's act is unauthorized, it is still within the scope of his employment if it is of the same general nature of and incidental to the conduct authorized. For the master to escape liability, it must be shown that the servant, when the wrongful act was committed, had abandoned his employment and

was acting for a purpose of his own which was not incident to his employment. If the injurious act is not shown to be a separate and independent transaction, the master is not relieved because the servant in some respect acted beyond his authority. A servant usually is not employed to be negligent, but this does not mean that a negligent act is outside the scope of his employment. The master is liable if the act was incident to the ultimate purpose of the servant's employment.

* * *

[255] Consequently, this Court finds that based upon the applicable law and in particular the very clear statement in the restatement that mere operation outside authority or and in so doing, performing a negligent act and breaking of rules does not necessarily take one out of the course and scope. This Court finds that Mr. Reeves was engaged in his master's business in a time space continuum that was relevant with that. This Court finds that what he was doing was engaged in what he was assigned to do. And that is coordinating and facilitating the movement of men, equipment, and supplies; that if he did in fact put his hands on it and manipulate the pipe, that this was sufficiently similar to his facilitation to the movement of the pipe so as not to take it completely outside the realm and that he was not – he had not in fact abandoned his job and he was not on his own business. He was not on a flight of fancy. As such, then even if the 15(b) were to be allowed and even if the Court were to overrule Mr. Siess's objection on Rule 16 and Rule 26, this Court would nonetheless find that defendants could not and did not establish that in fact Mr. Reeves was outside the course and scope of his employment. It is important to note that as to this issue, the Court allowed the defendant,

C&F, to put on any and all evidence that it desired as to this issue with the exception of calling Mr. Baumgardner live in [256] its case in chief; but that was for other reasons which were discussed on the record earlier, i.e., Mr. Baumgardner left because of his wife's illness. However, this Court allowed Mr. Baumgardner's deposition which was taken at a time when counsel for C&F argues they were intending to make this argument and therefore dealt with it into the record. And in fact, there are questions that deal with this in the record. Additionally, it is important to note that Mr. Baumgardner in fact testified as to the issue, underlying issues of course and scope when he was called by the plaintiff in the plaintiff's case in chief and Mr. Siahatgar was – I'm not certain whether it was when he was questioning, but certainly it was gone into. There was some ambiguity that flagged this question for the Court, and the Court followed up with some questions to see if in fact that's what we were dealing with. So it is important to note that C&F was allowed to put in any and all evidence and all testimony that they wanted on this issue; and it's only after full review of that that the Court finds that, nonetheless, they would not have been successful in proving he was outside course and scope, of course, with the exception of being able to call Mr. Baumgardner live in their case in chief after his having been on the stand and having testified to this issue in plaintiff's case. But they were allowed to put in his deposition at a time when [257] they claimed they were aware of this issue and in fact were dealing with it.

The Court will not reiterate at this time the underlying rationale on 15(b) and who has the burden because the Court allowed C&F to put on whatever they wanted to put

on with that one exception. Consequently, the Court need not address that at this time.

Because this Court finds that to allow the amendment would be futile because under the law, given all the evidence presented, this Court finds that he would not have been outside his course and scope, this Court denies the motion on 15(b). However, this Court does note for purposes of appellate record that in Mr. Baumgardner's deposition taken on July 20, 2000, beginning at Page 19 and extending thereafter to some 3, I think all the way over to like 23, that there is this discussion that hinges to some degree on this matter at issue. So C&F had the opportunity to put in Mr. Baumgardner's deposition. They had the opportunity to cross him when he was on direct with the plaintiff, and they had the opportunity to put him on instead of Mr. Serrette at the close of the day if they knew that there were medical problems. And they were the only ones who could have known it. Mr. Baumgardner is their client.

Unseaworthiness. Plaintiff has also made a claim for [258] unseaworthiness of the Marine Vessel MARGARET against Parker as the owner and operator of the vessel. In determining plaintiff's claim for unseaworthiness, this Court finds instructive the rationale in Little V Green, 428 Fed Second, 1061, Fifth Circuit 1970, which indicates quote, the rationale behind the doctrine of unseaworthiness is to protect the seaman from dangerous conditions beyond their control. Common sense says and pure mechanics confirm that if Little, the plaintiff in that case, had not jerry-rigged the vertical levers which control the power to the winches, that these levers did not have to be held continuously by hand to keep the winches turned. He would not have been injured. If Little's jerry-rig had not

locked these levers and hence the power to the winches, then the instant his foot touched the winch and he released his hold on the vertical levers, the pull of the nets would have stopped and the turning of the winch. His injury was attributable to his own contrivance, not the machinery provided or the procedures prescribed of the vessel. Had little's jerry-rig been part of the regular equipment of the vessel or had some other member of the crew installed the jerry-rig, the problem would be different. But here Little created his own danger and effectively caused his own injuries. The proof shows that the captain had no knowledge of the use of the jerry-rig until it rescued [259] Little. We recognize that a shipowner has been held liable in the Doctrine of Unseaworthiness even where he supplied a seaworthy vessel and proper appurtenances and crew; but an officer or a crew member negligently rigged the device or appliance so as to render it temporarily unseaworthy, and another crew member was injured. And cites are given. While we are unwilling to hear, announce or apply a new variation of that rule which would allow the coverage of the addition of temporary unseaworthiness deliberately brought about without the shipowners' or the captain's knowledge by the same seaman who then injuries [sic] himself on the very defect he intentionally created. Unseaworthiness does not extend to the negligent use of seaworthy appliances. Under these circumstances, the owner did not as a matter of law violate his absolute duty to provide a seaworthy vessel.

In this case, Dudley Foussell was the captain of the vessel, the Marine Vessel MARGARET. It is undisputed that he as the captain of the vessel had control over where the cargo was placed on his vessel for transport or whether to accept the cargo at all. It is further undisputed that

Foussell was the individual who chose to place the pipe at issue on a water cooler and chose not to secure the pipe in any fashion. And the plaintiffs have failed to establish that it was impossible for his pipe to have been secured [260] in some fashion at some point from the point where it was in the bow of the vessel running up and onto the back deck, and there is testimony that in fact pipe has been carried in that fashion on the floor without instant. [sic] It is further undisputed that the manner chosen to stow the pipe on the vessel was totally of Captain Foussell's device. It is further undisputed that Foussell chose to place his head under an unsecured 20 foot, approximately 100 pound pipe perched approximately 40 inches above the floor level with full knowledge that the vessel was tied stern to; and he now had people on his back deck moving about, consequently, making the boat more susceptible to wave action or making is [sic] foreseeable that someone could have jostled, hit pulled etcetera, the pipe.

Consequently, although this Court could find perhaps that the negligent acts of Captain Foussell might perhaps have created a condition which might have been temporary unseaworthiness, however, as per the law noted above, this alleged temporary unseaworthiness cannot form the basis for recovery by Captain Foussell under unseaworthiness when in fact it is he who created the condition. There is no evidence that Mr. Reeves knew the pipe was sitting unsecured and sitting on a dome of a water cooler approximately 40 inches above the bottom of the boat; and there is no evidence that Reeves was aware that the captain [261] had any intention to bend over prior to his bending, so as to place his body beneath a pipe that was sitting approximately 40 inches above the bottom portion of the boat. 40 inches is not that tall. Consequently,

this Court finds that the Marine Vessel MARGARET was not unseaworthy. The pipe could have been carried in a fashion which would have been safe and rather that Mr. Foussell cannot, nonetheless, even if the Court were to find differently, recover under seaworthiness when in fact it is his negligent act that created the unseaworthiness. Accordingly, this Court denies plaintiff's claim for unseaworthiness of the Marine Vessel MARGARET against Parker Brothers as the owner and operator of same.

* * *